No. 86-115

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

DENIS R. O'BRIEN

*Petitioner,*

v.

SHC CORPORATION, et al.

*Respondents*

## PETITION FOR A WRIT OF CERTIORARI

## TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. Benjamin Dick, Esquire *
Law Offices of J. Benjamin Dick
421 Park Street
Suite 2
Charlottesville, Virginia 22901
(804) 977-6607

*Counsel of Record

*Attorney for Petitioner*

154 pp

# QUESTIONS PRESENTED

1.

Certiorari Should Be Granted To Declare Va. Code §8.01-329 On Its Face And As Applied by Respondents And The State To Be Repugnant To the United States Constitution and to the Individual Rights of Dr. O'Brien Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

2.

A Writ of Certiorari Should be Granted To Dr. O'Brien and His Class of Persons Similarly Situated to Determine What Are the Reasonable Minimum Constitutional Standards Among The States As to Their 'Long Arm Statutes Regarding Service, Notice, and Methods of Proof of Service and Notice Upon Non-residents So Not to Be Repugnant to the United States Constitutions' Fourteenth Amendment Due Process and Equal Protection Clause.

3.

A Writ Should be Granted to Dr. O'Brien To Review The Decision of the Court Below to Grant the Respondents' Motion to Dismiss or In the Alternative, Summary Judgment Ruling That His Action was Inappropriate Under 42 U.S.C. §1983 As to the Respondent SHC Corporation And the Secretary of the Commonwealth Ruling No State Action Was Present.

## PARTIES

Pursuant to Rule 21.1(b) of the Supreme Court, counsel certifies that the following is a complete list of all parties to the proceedings below and additionally, all parties and persons believed to be interested in the outcome of this Petition.

The parties to this action are Denis R. O'Brien, SHC Corporation, a Virginia Corporation a/b/a Mousetrap Vintage Cellars, Laurie Naismith in her capacity as the Secretary of the Commonwealth of Virginia, or her successor, Gerald Baliles, Attorney General of Virginia, Successor Mary Sue Tarry, and John C. Lowe, Esquire and Lowe, Gordon, Jacobs & Snook, Ltd..

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented ..... | i |
| Parties ..... | ii |
| Table of Authorities ..... | v |
| Opinions Below ..... | 1 |
| Jurisdiction ..... | 2 |
| Constitutional Provisions Involved ..... | 3 |
| Statement of the Case ..... | 5 |
| Manner in Which the Federal Questions Were Raised Below ..... | 24 |
| Reasons for Granting the Writ ..... | 26 |
| 1. Certiorari Should Be Granted To Declare Va. Code §8.01-329 On Its Face And As Applied by Respondents And The State To Be Repugnant To the United States Constitution and to the Individual Rights of Dr. O'Brien Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment ..... | 26 |

Page

2. A Writ of Certiorari Should Be Granted To Dr. O'Brien and His Class of Persons Similarly Situated to Determine What Are the Reasonable Minimum Constitutional Standards Among The States As to Their Long Arm Statutes Regarding Service, Notice, and Methods of Proof of Service and Notice Upon Non-residents So Not to Be Repugnant to the United States Constitutions' Fourteenth Amendment Due Process and Equal Protection Clause..... 47

3. A Writ Should Be Granted to Dr. O'Brien To Review The Decision of the Court Below to Grant the Respondents' Motion to Dismiss or in the Alternative, Summary Judgment Ruling That His Action was Inappropriate Under 42 U.S.C. §1983 As to the Respondent SHC Corporation And the Secretary of the Commonwealth Ruling No State Action Was Present ..... 56

Page

Conclusion ..... 61

Certificate ..... 62

## TABLE OF AUTHORITIES

PAGE

Boddie v. Connecticut 401 U.S. 371 (1971) ..... 45

Burton v. Wilmington Parking Authority 365 U.S. 715 6 L.Ed. 2d 45 (1961)..... 61

Clemens v. District Court, 154 Colo, 176, 390 P2d. 83 (1964) ..... 34, 36

Fuentes v. Shevin 407 U.S. 67 (1972) ..... 45

Grannis v. Ordean 234 U.S. 385 at 394, 58 L.Ed. 1363 (1914) ..... 45

Greene v. Lindsey 456 U.S. 444, 72 L.Ed.2d 249, at 255 (1984) ..... 43,48,49 54

Henry v. First National Bank of Clarksdale (Henry II) 595 F.2d 291, at 229, cert. denied 444 U.S. 1074 (1980) ..... 60

PAGE

Hess v. Pawloskwi, 274 U.S. 352 (1927) ..... 29, 36

International Shoe Co. v. Washington 326 U.S. 310, 66 S.Ct. 154 (1945) ..... 42,46

Lassiter v. Department of Social Services of Durham County North Carolina, 452 U.S. 18, 181 S.Ct. 1908 (1981) ..... 45

Leach v. Farmsworth and Chambers and Co. 231 F.Supp. 157 (D.Colo. 1964) ..... 34

Lugar v. Edmondson Oil Co. 457 U.S. 992 (from 639 F.2d 1050 (4th Cir. 1981), reversed in part, at 934-935..... 56,57,61

Lydick v. Smith 266 NW2d 208, at 211 (1978 S.Ct. Nebraska)..... 32

McDonald v. Mabee 243 U.S. 90, 61 L.Ed. 608 (1917).. 43,49

Milliken v. Meyer 311 U.S. 457, 61 S.Ct. 339 ..... 42,49

Moyer v. Lott 272 N.W.2d 232 at 234 (Court of Appeals of Michigan, 1978)..... 33

| | PAGE |
|---|---|
| Mullane v. Central Hanover Bank and Trust Co. 339 U.S. 306, at 318, 70 S.Ct. 652, 659, 94 L.Ed. 865 (1950) ..... | 34,35,36, 37,38,41 44,46,47 49 |
| North Laramie Land Co. v. Hoffman 268 U.S. 276 at 283 69 L.Ed. 953 (1925) ..... | 47 |
| Poulous v. New Hampshire 345 U.S. 395, 97 L.Ed. 1105 (1953) ..... | 45 |
| Schroeder v. City of New York 371 U.S. 208 at 212 (1962) ..... | 45 |
| Shaffer v. Heitner 433 U.S. 204, 97 S.Ct. 2569 (1977).. | 42,48 |
| Statewide Machinery Co. v. Alperin 591 F.2d 234 (3rd Cir. 1979) ..... | 35 |
| Vox v. Durgan 298 F.Supp. 1365 (E.D. Tenn) Supplemental opinion 302 F.Supp. 1262 (E.D. Tenn. 1969)... | 32 |
| Wachter v. Pizzutti 276 U.S. 13, at page 19 (1928).... | 30 |

## OTHER AUTHORITY

PAGE

Note, Service of Process by Mail, 74 Michigan Law Review 381 (Dec. 1975) ..... 30,33 35

## TABLES and APPENDICES

Table One ..... 1-A

Table Two..... 1-B

Table Three ..... 1-C

Appendix A ..... A-1

Appendix B ..... B-1

Appendix C ..... C-1

Appendix D ..... D-1

Appendix E ..... E-1

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Denis R. O'Brien, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit and the U.S. Federal District Court for the Western District of Virginia, at Charlottesville.

### OPINIONS BELOW

This action was the subject of a federal suit brought in the United States Federal District Court, Western District of Virginia, Charlottesville Division. The federal action was filed as a class action by the petitioner challenging certain state default and final judgments entered against him

under Virginia's Long Arm Statute.

The final decision of the U.S. Federal District Court was filed April 15, 1985. (App. A-5 through A-29). The appeal to the U.S. Court of Appeals for the Fourth Circuit was decided March 4, 1986. (App. A-2). A Petition for Rehearing was decided April 22, 1986.

The state judgments below are contained in Appendix B (B-11 through B-20) entering default and final judgments, April 5, 1982 and June 17, 1982 respectively.

## JURISDICTION

This Court's Jurisdiction is invoked under 28 U.S.C. 1331, 28 U.S.C. §1343(3), 42 U.S.C. §1983, 28 U.S.C. §1254, 28 U.S.C. §1257(2), 28 U.S.C. §1331, and 28 U.S.C. §2201, §2202.

## CONSTITUTIONAL PROVISIONS INVOLVED

### UNITED STATES CONSTITUTION

### AMENDMENT 14

Section 1. Citizens of the United States. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE SERVICE

42 U.S.C.S. §1983

**§1983. Civil action for deprivation of rights.** Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be proper proceeding for redress....

## STATEMENT OF THE CASE

This case arose out of respondents' state utilization of the Virginia Long Arm statute "Service of Process or Notice", (Va. Code §8.01-329 at pages 1-C through 3-C of Table Three herein) and the state rule of court, (Rule 3:17 of the Rules of the Virginia Supreme Court governing "Default Judgments" at pages 4-C through 5-C of Table Three herein), to obtain on a Massachusetts resident, the petitioner, in personam jurisdiction by substituted service and enter against him default judgments in Virginia without his knowledge, in his absence, and without his receiving notice of the same or actual service of process being made upon his person. [Note: Final state monetary judgments were entered against Petitioner after a jury verdict, also conducted in Dr. O'Brien's absence, which to date total

in excess of $95,000.00 for alleged tortuous acts committed in Virginia by Dr. O'Brien while he was a student at the University of Virginia.]

Thereafter, respondents sought to enforce the Virginia state judgments in the State of Massachusetts. The State of Massachusetts has upheld the respondents' rights to execute on the Virginia judgment on the basis of the full faith and credit clause for judgments rendered in Virginia. (SHC Corporation d/b/a Mousetrap Cellars v. Denis R. O'Brien, Superior Court #82-4860, Commonwealth of Massachusetts at Middlesex.)

Petitioner, Dr. O'Brien, as a doctoral student of pharmacology at the University of Virginia, one night visited a local restaurant across from the University that imposed on its entering patrons the maintaining of a red

paper tab which was to be kept by the patron for beverages or food consumed, the charges to be placed on the same by management when ordered and paid for upon leaving the restaurant. (The restaurant was owned by the respondent SHC Corporation.)

Dr. O'Brien did not sit at the counter, order, or buy anything when he entered. He elected in a brief period of time, finding friends whom he had met in the restaurant, to elect their option to go to another local establishment and all started to leave. The petitioner was stopped at the register for want of his red tab. Looking for it and checking his pockets, he announced he had either lost it or misplaced it but noted he had not purchased beverage or food. A dispute by management over the need to produce the red tab erupted.

Management informed Dr. O'Brien he faced paying a penalty charge of $5.00 for a lost red tab. The dispute spilled out onto the public street. Dr. O'Brien refused to pay $5.00. (App. A-9).

Next, the manager, Christopher Wren, an SHC Corporation employee, halted Dr. O'Brien accusing him publicly of trying to defraud the restaurant and hailed a police cruiser to come to the restaurant. Outside, the SHC Corporation by its employee insisted in front of Dr. O'Brien's friends that the police take custody of Dr. O'Brien and that he be taken to the local Magistrate in order for a criminal warrant to be processed against him. Before the magistrate, management admitted Dr. O'Brien had not purchased food or beverage. Nonetheless, management asked that a larceny warrant issue against Dr. O'Brien

for taking the ticket advising the magistrate the ticket was worth $5.00. The magistrate questioned the value and consulted with the Commonwealth Attorney who instructed the magistrate no prosecutable offense existed. The magistrate gave Dr. O'Brien his freedom. (App. A-10)

Having been embarrassed, humiliated, and mortified by the experience in front of his friends and in public, Dr. O'Brien consulted with a local reputable law firm, McGuire, Woods & Battle. On a contingency fee arrangement, this law firm agreed and did file on Dr. O'Brien's behalf two law suits, one in the local state court[1] and one in the local federal

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[1] Denis O'Brien v. SHC Corporation, Circuit Court of Charlottesville, Law #2204

district court[2] under diversity of citizenship jurisdiction. (Dr. O'Brien at the time was an out of state student from Ohio attending the University of Virginia.) The suits sought damages for among other claims false imprisonment and abuse of process.

Processing the state court action first, SHC Corporation through its counsel, respondent John C. Lowe, sought to have the case dismissed on the grounds that Dr. O'Brien had not stated a state cause of action upon which relief could be granted. The state court agreed and dismissed the case. (App. A-10)

In the federal court action, McGuire, Woods & Battle, deeming the case a losing proposition from the point of view of

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2 Denis O'Brien v. SHC Corporation U.S. Federal District Court, Western District of Virginia, Civil Action #80-0085(C).

the law firm's time being expended, sought to withdraw as counsel and was granted the right to do so by the U.S. Federal District Court for the Western District of Virginia. Dr. O'Brien, being a student financially strapped, represented himself not being able to find new counsel nor having financial means to hire new counsel. The federal court for the Western District of Virginia similarly dismissed Dr. O'Brien's Complaint against the SHC Corporation on January 5, 1982. Dr. O'Brien was asked on that day by SHC Corporation's counsel, Mr. Lowe, where he would be. (App. D-1 to D-2 , Affidavit of Denis O'Brien in state motion to set aside default judgment.) Dr. O'Brien responded to Mr. Lowe's inquiry that he had won a fellowship at the Harvard Biological Laboratories and he would be located

at that facility in Cambridge, Massachusetts.

After leaving the University of Virginia, having graduated in December 1981, the federal action of Dr. O'Brien's against the restaurant corporation being dismissed in January of 1982, by February of 1982, Dr. O'Brien had located temporary living quarters at 184 Farrington, Wollaston, Massachusetts so to attend the Harvard Biological Laboratories as a fellow. Within a very short time frame, Dr. O'Brien would move from that address to more permanent quarters. In so doing, he left a forwarding address with the post office. (App. C- 7 )

Using the Wollaston, Massachusetts address, the SHC Corporation, Christopher Wren, and Diane Brubaker (owner of the SHC Corporation) instituted on February 16, 1982 a Virginia state law suit under

the Virginia Long Arm Statute (Va. Code §8.01-328.1(A)(3)) in the Virginia Circuit Court of the City of Charlottesville, the same state court in which Dr. O'Brien had previously lodged his state lawsuit against the SHC Corporation and Christopher Wren. (Diane Brubaker, SHC Corporation's President later withdrew her lawsuit, App. A-13 .) The respondents naming themselves as plaintiffs, sought damages against Dr. O'Brien on the basis of tortuous conduct, viz., alleged abuse of process, malicious prosecution, intentional infliction of emotional harm, and trespass while he lived in Virginia. (SHC Corporation, et al. v. Denis O'Brien Circuit Court of the City of Charlottesville, Virginia Law Case #2532; Christopher Wren v. Denis R. O'Brien, Circuit Court of Charlottesville, Law Case #2533). They sought jointly against

Dr. O'Brien a $300,000.00 verdict of compensatory and punitive damages.

The Plaintiffs, by their counsel, to serve notice and process, utilized under the long arm statute Va. Code §8.01-329 for "Service of Process and Notice" to give legal process and notice of the pending lawsuits in Virginia against Dr. O'Brien who was located in Massachusetts. The respondents, by counsel, sent an affidavit required under the state statute (App. B-3 to B-4)) and electing to use §8.01-329 A(1)(i) (Table Three, §8.01-329, 1-C ), stated that Dr. O'Brien was a "non-resident". Respondents gave the address of "184 Farrington, Wollaston, Massachusetts" requesting of the Secretary of the Commonwealth, as statutory agent under the long arm statute, to make

service under Va. Code §8.01-329 against Dr. O'Brien.

The Secretary of the Commonwealth issued an "Affidavit of Compliance" back to the Clerk's Office of the Circuit Court, dated February 17, 1982, stating she had mailed by certified mail the notice. (App. B-1 to B-2). The certified mail by the Secretary of the Commonwealth came back marked "unclaimed" from the 184 Farrington address, this being acknowledged in the respondents' state motions for judgments. (App. B-5 to B-7, paragraph #4 thereof at B-6.)

Dr. O'Brien on his own at counsel's direction, before instituting this federal constitutional and 42 U.S.C. §1983 challenge, retrieved a copy of the Secretary of the Commonwealth's certified mail envelope that was returned "unclaimed". (See App. B-21, true copy of per-

tinent part thereof.) Much to his surprise, Dr. O'Brien would, after the state judgments were entered, discover that the postmark on the Secretary of the Commonwealth's envelope was February 23, 1982 (App. B-21) which failed to be the same date of Secretary of the Commonwealth's affidavit of compliance, February 17, 1982. (App. B-1 to B-2). It was thus proven that it took the Secretary of the Commonwealth **seven days, or a full week, to post-mark the certified mail as to the notice that she had dated seven days before and given an affidavit of compliance as to the date she sent it.** (Emphasis added).

The State Circuit Court Clerk's Office received the Secretary of the Commonwealth's Affidavit of Compliance on February 24, 1982 as evidenced by the clerk's handwritten notation. (App.

B-22, true copy of pertinent part thereof.). This fact proved critical to Dr. O'Brien as by the time the certified mail had arrived in Massachusetts, he had moved to new quarters and was in the process of permanently locating.[3]

After the certified mail came back to Virginia from Massachusetts "unclaimed", the respondents having waited for the 21 days required under a state court rule (Rule 3:5 of the Virginia Supreme Court Rules, App. B-23) for the defendant to answer, (and Dr. O'Brien as the defendant not knowing he had been sued would

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[3] Dr. O'Brien also left his new address with the post office. When he did get back to his old address, he found attempted delivery slips of unknown certified mail and on going to the post office, he found the certified mial had been returned to sender. (App. A-19).

never answer), the respondents then filed motions to the state court to enter "default judgments." (App. B-5 through B-10). In both of those motions, the respondents' counsel noted at paragraph #2, (App. B-5 and B-6; B-8.) : "Plaintiff's counsel learned from the office where O'Brien works in Cambridge, Massachusetts where his home address is."[4] (Emphasis added). [Note: At no time would respondents in the state litigation ever send any notice of the state proceedings to Dr. O'Brien's work place which they knew as admitted and they knew as early as January 5, 1982 after his federal lawsuit was dis-

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[4] Dr. O'Brien had informed SHC Corporation on January 5, 1982 that he would be working at the Harvard Biological Laboratories. (App. D-2 ).

missed, Mr. Lowe, counsel for the respondents making the inquiry, a good month before they sued him].

The certified mail arrived "unclaimed", of course, since Dr. O'Brien had left his temporary home address at 184 Farrington to move into a permanent one. (See also Affidavit of Denis O'Brien, App. D-1). At paragraph #4 of both state motions for default judgments (App. B-6 and B-9), it was admitted in the last sentence by respondents to the state court "To date said letter has not been claimed." Nonetheless, the state court and the respondents proceeded uninhibited based on their construction of Va. Code §8.01-329 that such service was "sufficient" under the long arm statute.

On April 5, 1982, the state Circuit Court entered "default judgments" at

the respondents' request noting in the judgment order:

> "And it appearing that the defendant was served by the Secretary of the Commonwealth on February 17, 1982, and that no answer or responsive pleading of any kind has been filed by him or on his behalf, and more than 21 days having elapsed since said service..."

(App. B-13 and B-14A).

In the Court's own handwriting of those orders, it further stated "Plaintiff is directed to mail a copy of this order to the defendant". The respondents, already noting to the Court in their motions for default judgments that the Secretary of the Commonwealth's mail went "unclaimed" (App. B-6 and B-9, paragraph #4 thereof), utilized, nonetheless, the same ineffective and dead address of Dr. O'Brien's to comply with the Court's direction in mailing copies of the default judgment orders by certified mail to the 184 Farrington, Wollas-

ton, Massachusetts address which also came back "unclaimed". (Dr. O'Brien's Brief Below Exhibit #4, App. A-13.)

Up to this point in time, Dr. O'Brien, as an out of state resident, a U.S. citizen of another state, had not been served actually or personally. The long arm statute substituted service resulted under Va. Code §8.01-329 in no notice of what was happening to him in Virginia. The respondents and the Secretary of the Commonwealth knowing the mail had gone "unclaimed", nonetheless and regardless of the same, the respondents and the state court proceeded boldly. Without his knowledge, without actual or substituted legal service or process being effected upon him, without any notice whatsoever, the Virginia State default judgment proceedings were effectuated on him

to secure state default judgments. These were entered of record in the Virginia state proceedings under the long arm statute and on the basis of Va. Code §8.01-329 "Service of Process and Notice" while Dr. O'Brien was a student in Massachusetts who was totally unaware of the same.

Thereafter, Rule 3:17 of the Rules of the Virginia Supreme Court controlled the state cause and the rule waives the defendant's rights to any further state notices of any further proceedings in the state court of any kind to Dr. O'Brien. If Dr. O'Brien showed up, he was barred from objecting to the admissibility of evidence, and forfeited his right to a jury. (Rule 3:17, Table Two, 4-C, 5-C).

The respondents, after gaining default judgments and the advantage

of Rule 3:17, elected to go to a jury. The state jury was impaneled with strikes against the panel being exercised by the state judge presiding at trial (the same judge who had dismissed Dr. O'Brien's case against SHC Corporation) and by the petitioners' counsel, Mr. Lowe. (Dr. O'Brien made no appearance.) Final state judgment orders were duly recorded on the return of the jury verdicts. (App. B-15 through B-20).

[Note: Before the jury trial, Dr. O'Brien on hearsay from a friend located in Charlottesville, heard that a newspaper article had stated he had been sued and judgment was entered against him. Dr. O'Brien, without surrendering to the jurisdiction of the Court and making no special or general appearance, quietly went from Massachusetts to the Clerk's Office in Charlottesville and

confirmed by what he saw in the state court file that two state judgments (default judgments) had been entered against him without any service on him, without notice, in his absence, and without his knowledge. See, App. D-1]

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED BELOW

Dr. O'Brien filed suit in the United States Federal District Court for the Western District of Virginia in 1984 as a class action and for himself asserting:

1) Va. Code §8.01-329 on its face and as applied by the respondents were violative of Dr. O'Brien's constitutional rights of due process and equal protection under the Fourteenth Amendment.

2) The collective acts of the respondents and the Secretary of the Commonwealth constituted state action

under the color of state law and in so doing violated his constitutional rights under 42 U.S.C. §1983.

The Federal District Court granted the respondents motion to dismiss and in the alternative summary judgment on Dr. O'Brien's claims by order of April 15, 1985, (App. A-5 through A-7), supported by memorandum opinion. (App. A-8 through A-29). The U.S. Fourth Circuit Court of Appeals affirmed the District Court decision by order of March 4, 1986, (App. A-2 through A-4, supported by an unpublished opinion.) The Fourth Circuit denied a petition to rehear by order of April 22, 1986. (App. A-1).

Dr. O'Brien also filed a state motion to set aside the default judgment under Va. Code § 8.01-428 and asked the federal district court to take pendant jurisdiction over the same.

## REASONS FOR GRANTING THE WRIT

**Certiorari Should Be Granted To Declare Va. Code §8.01-329 On Its Face And As Applied by Respondents And The State To Be Repugnant To the United States Constitution and to the Individual Rights of Dr. O'Brien Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.**

Petitioner is advocating a minority position as to the law, but as a U.S. citizen he believes in his individual rights and urges that Va. Code §8.01-329 is constitutionally infirm requiring far less of state plaintiffs in Virginia suing out of state defendants under the Virginia long arm statute as to service of process and notice than a number of sister states. Further, as set out below, Petitioner seeks to have the United States Supreme Court declare by this case that all such state statutes similar to Virginia's §8.01-329 are repugnant to the United States Constitu-

tion.

The Virginia legislature enacted §8.01-329 to be a part of its long arm statute as to notice and service of process for lawsuits filed by Virginia residents in its state courts against citizens of the different states. Nearly all the states have a long arm statute and a service of process and notice provision. Permitted grounds of the long arm statute include alleged tortuous acts by and while the citizen of a different state was in and about the state with only minimum contacts. Va. Code §8.01-328.1(A)(3) is a "single action" long arm statute and a single cognizable wrong by a citizen out of state in Virginia allows the sovereignty of the state of Virginia to extend its jurisdiction across state territorial limits to each state in the union.

The adjunct long arm statute fo notice of such suits declares as t service of process and notice that "suc service shall be sufficient" if sen by "registered or certified mail" wit delivery receipt requested by the Secre tary of the Commonwealth to the perso or persons to be served at the las known post-office address of such person Under the construction of the applicatio and meaning of this statute by the court below, it is a statute held to mee the minimum constitutional requirement even if, as in this case, the citize of the different state never receive the registered or certified mail. person of another state could be absen from his home due to his or her's vaca tion, in the process of moving, illness, job, pregnancy, insanity, or the lik when the certified mail arrives an

due to not being there under the rules of the Postal Service, the citizen misses it and the mail goes back to sender. (See Table Two, U.S. Postal Regulations). However, under Virginia's statute, just mailing the registered or certified mail is "sufficient" service whether or not the Commonwealth of Virginia's Secretary of the Commonwealth ever gets a signed receipt back or not, further it is apparently not relevant nor does it matter the mail goes unclaimed and if a receipt came back, Va. Code §8.01-329 makes no disposition of the same.

Use of the mails have expanded steadily since 1927 when the United States Supreme Court upheld a Massachusetts non-resident motorist service of process statute permitting service by mail. Hess v. Pawloskwi, 274 U.S. 352 (1927). Soon thereafter, Chief

Justice Taft voiced the fear in Wachte
v. Pizzutti 276 U.S. 13, at page 1
(1928), that the systematic assertio
of jurisdiction over out-of-state defen
dants who fail to claim their mail woul
go so far as to permit a plaintiff t
serve process on a patiently false addres
and obtain jurisdiction when the lette
returns "unclaimed." Certainly suc
a scheme is feasible under Va. Cod
§8.01-329.

A number of states, to assure actua
notice of a pending suit, require i
their long arm notice that the Plaintif
file a signed return receipt with th
Court. (See generally, Note, Servic
of Process by Mail, 74 Michigan La
Review 381 (Dec. 1975). (See Also,
Table One). However, the Virginia Legis-
lature, while providing for a retur
receipt, does not expressly require

a signed receipt must be filed with the Court to give proof of service nor that it be returned to the Court to prove actual service. The Courts below did not give the statute any implied mandate that a receipt is necessary, it being "sufficient" just to put it in the mail system. The result is clearly illustrated by Dr. O'Brien's instant case, resulting in default judgments in abstentia and a $95,000.00 civil verdict harnessed upon him.

In an extensive search, the cases nationally are few in holding that failure to receive certified mail or registered mail or the same being "unclaimed" violate the due process clause and equal protection clause under the Fourteenth Amendment where service of process and notice by certified or registered mail are authorized under long arm statutes as

substituted service. In Vox v. Durgan 298 F.Supp. 1365 (E.D. Tenn), Supplemental opinion 302 F.Supp. 1262 (E.D. Tenn. 1969), however the Court held that where a return receipt on service of process sent by registered mail was never signed by the defendant, the service violated due process. (The Court's ruling was premised, however, on a Tennessee statutory requirement that the receipt be signed by the defendant or by someone on his behalf.) Many of the states have such a requirement and had Dr. O'Brien been sued in those states, the result imposed on him in Virginia would be entirely different in those states. (See Table One).

Similarly, in another single case reported in the United States, Lydick v. Smith, 266 NW2d 208, at 211 (1978 S.Ct.. Nebraska), the Court held that

the service of process statute would be strictly construed in that state and ruled in that it was undisputed the registered letters receipt sent to defendant's last-known address were returned "unsigned", absent a showing of personal delivery to the defendant (a student at the University of Nebraska), the proof of service was deemed inadequate under Nebraska law.

In contrast, in the Michigan reported case of Moyer v. Lott, 272 N.W.2d 232 at 234 (Court of Appeals of Michigan, 1978), having a long arm statute for service of process and notice (Michigan Compiled Laws (Ann. §600-1913)) similar to Virginia's Va. Code §8.01-329, it was held the fact that the "substituted means of service do not, in fact, convey actual notice to the opposing party does not necessarily violate due process."

The Michigan Court relied upon, as the respondents have, Mullane v. Central Hanover Bank and Trust Co. 339 U.S. 306, at 318, 70 S.Ct. 652, 659, 94 L.Ed. 865 (1950) that so long as it is reasonably calculated to reach the person, that is enough. (Hereinafter "Mullane".)

The statue of Michigan is similar to Virginia's as to being silent on the disposition of the requirement of a certified or registered mail to a last known address as to the "return receipt requested." The Colorado Supreme Court in Clemens v. District Court, 154 Colo. 176, 390 P2d. 83 (1964), (See Also Leach v. Farmsworth and Chambers and Co. 231 F.Supp. 157 (D.Colo. 1964) relying on the Clemens holding, held the failure of the Colorado statute on its face to specify the disposition of the "return receipt" violated the

due process clause of the Colorado Constitution which is identical to its counterpart in the U.S. Constitution.

Otherwise, it appears a majority of states and the federal judiciary, even though the Mullane test of "reasonable probability of actual service" has not been adequately explained by the Courts, hold clearly that a defendant need not ever receive the process. (Note: Service of Process by Mail, 74 Michigan Law Review 381 at 383, (1974).) Such a result occurred in Statewide Machinery Co. v. Alperin 591 F.2d 234 (3rd Cir. 1979) when registered letter sent pursuant to the long arm statute returned "unclaimed." (In that case, 42 Pa. Cons. Stat. Ann. §8307 explicitly provides that service is valid even without a return receipt.) The tennous result are default judgments

made similar to Dr. O'Brien's.

In Hess v. Pawloski 274 U.S. 352 47 S.Ct. 632, 71 L.Ed. 1091, (1927) the Court held that a non-resident motorist involved in a motor vehicle accident could be subjected to the jurisdiction of Massachusetts by substituted service because the Massachusetts state required the defendant's return receipt and the plaintiff's affidavit of compliance to be "appended to the writ." (Cited in Clemens v. District Court 390 P.2d 83 (1964).) The reasoning given by this Court in such motorist statutes was that the defendant would receive actual notice of the action against him.

The Mullane decision decided in 1950 regarded mail as a permissible and reliable mode of notification and in that case concluded the plaintiffs

should have used service by mail rather than service by publication. This Court in Mullane, however, announced caveats that should apply to Dr. O'Brien. The Court stated: "Now and then an extraordinary case may turn up, but constitutional law like other moral constrivance has to take some chances, and in the great majority of instances no doubt justice will be done." Dr. O'Brien's case does not fall into the realm of the great majority of cases, it is that "extraordinary case" that any citizen of the United States could possibly face in our transient and mobile society, its result being of tragic proportions such as it was for this non-resident student just starting out in life.

Mullane, Id. at 319, also stood for the proposition that service and notice were inadequate when they are

"not reasonably calculated to reac [someone] who could easily be informe by other means at hand." (Emphasi added). This Court, (Id. at 318), opined

> "We find no tenable ground for dis pensing with serious effort to infor them personally of the accounting at least by ordinary mail to th record addresses."

The respondents knew where Dr. O'Brie worked, apparently knew his phone numbe at work, and knew at an early stag his mail went "unclaimed." (See Respon dent's Motion for Default Judgment App. B-5, at paragraph #4 at B-6, B-8 paragraph #4 at B-9.) The Respondent could have used the Massachusetts servic of process statute, Mass. Gen. L. Ann Ch. 223A, §9A to serve Dr. O'Brien a his place of work. A telephone cal would have sufficed that he'd been sued Those "other means at hand" were neve

utilized.

However, the obvious conclusion is that the respondents had the legal advantage of Va. Code §8.01-329 that all they had to do for service of process and notice was to have the Secretary of the Commonwealth certify in her affidavit of compliance that certified mail was placed into the mail system to Dr. O'Brien and nothing more. Twenty one days later after mailing, if Dr. O'Brien failed to file responsive pleadings and in this case he would because he never received the certified mail, he was then in default and default judgments were so entered. (App. Default Judgments B-11 through B-14.)

Conceding that certified mail or registered mail is a means reasonably calculated to reach someone in the United States, a number of states require return

receipts[5] and even expressly allow service outside of the state "where he is found". (e.g. Code of Maryland, Courts and Judgments, §6-103 Long Arm Statute, Service CJ §6-304.)

In Mississippi, Mississippi Code 1972 (Ann.), §13-3-63, to provide actual notice, it states:

> "The defendant's return receipt or evidence of defendant's refusal to accept delivery of such certified or registered mail ... shall be filed in the court wherein such action is pending before judgment can be entered against such non-resident defendant..."

The statute requires an affidavit for proof of defendant's avoidance and the Secretary of the State must "preserve" the same and "promptly return the same to the Clerk of the Court wherein such action is pending." Virginia Va. Code §8.01-329 has no such return receipt requirement and the Secretary of the Commonwealth need only preserve those

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[5] See Table One

records for two years.

In Minnesota, the Long Arm Statute (Minn. Stat. Ann. §543.19), Subdivision 2 allows service by personally serving the defendant outside of the state where he can be found, subdivision 4 allows any other service by the Minnesota Rules of Civil Procedure, Rule 4:05, which allows service by mail, first class mail, postage prepaid, with notice, and form 22 which requires an acknowledgment by the defendant, and if he fails to acknowledge, he is liable to pay any expenses incurred in the serving of summons and the complaint in any other manner permitted by law. In other words, in Minnesota you are required to get actual service. Va. Code §8.01-329 nor any Virginia Rule of Civil Procedure has any such assurance that this sort of "serious effort" (noted in Mullane)

be used for actual notice to the defendant.

In Shaffer v. Heitner 433 U.S. 204, 97 S.Ct. 2569 (1977), the Court analyzed in rem and in personam jurisdiction and whether the standards of "fairness and substantial justice" set forth in International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945) should be held to govern actions in rem as well as in personam between the states. The Court in Shaffer concluded that in rem and in personam actions would be weighed the same, under the minimum contact theory. In so doing, the Court relied on the test of Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339 that "traditional notions of fair play and substantial justice" to govern those actions.

No less of a standard should apply as to service of process and notice to out-of-state citizens when the minimum

contacts theory evoke the in personam jurisdictional hand of the sovereign state territorial boundaries to reach citizens of different states. In Greene v. Lindsey 456 U.S. 444, 72 L.Ed 249, at 255, this Court cited McDonald v. Mabee 243 U.S. 90, 61 L.Ed. 608 (1917) in striking down as unconstitutional service posted on tenants' doors in Kentucky, the McDonald v. Mabee Court, Id. 243 U.S. at 90, aptly stated:

> "No doubt there maybe some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice... And in States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." (Emphasis added)

The "foundation" announced in McDonald is "personal service guarantees actual

notice of the pendency of the action...", Id. at 91.

Va. Code §8.01-329 on its face and as applied to Dr. O'Brien is a flimsy fiction of substituted service that undermines the very concept of substantial justice and fair play, it tears down the foundation and makes a mockery of due process. The results are the civil judgments of the kind against Dr. O'Brien made in abstentia without meaningful legal notice or service. Even in Mullane, 339 U.S. at 306, this Court wrote: "when notice is a person's due, process which is mere gesture is not due process." (Emphasis added)

The due process clause when state action is mandated through one agency or another, requires at a minimum that the state action shall be consistent with the fundamental principles of liberty

and justice Poulous v. New Hampshire 345 U.S. 395, 97 L.Ed. 1105 (1953). "The fundamental requisite of due process is the opportunity to be heard." Grannis v. Ordean 234 U.S. 385 at 394, 58 L.Ed. 1363 (1914). Due process is a concept which embodies fundamental fairness and it cannot be precisely defined and defies any mechanical application of the Fourteenth Amendment. Lassiter v. Department of Social Services of Durham County North Carolina, 452 U.S. 18, 181 S.Ct. 1908 (1981); Boddie v. Connecticut 401 U.S. 371 (1971); Fuentes v. Shevin 407 U.S. 67 (1972). Va. Code §8.01-329 proven by the "extraordinary" case of Dr. O'Brien violates all of the above announced principles of constitutional law.

In Schroeder v. City of New York, 371 U.S. 208 at 212 (1962), fundamental

due process was well articulated.

> "...The requirement that parties be notified of proceedings affecting them legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process - the right to be heard." (Emphasis added)

Consistently so stated from Mullane, 339 U.S. at 314, and "the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear, default, acquiesce, or contest." The due process clause affords protection against "judgments without notice" International Shoe Co. v. Washington 326 U.S. 310 at 324, 66 S.Ct. 154 at 162 (1945).

For the reasons stated, the writ should be granted.

**A Writ of Certiorari Should be Granted To Dr. O'Brien and His Class of Persons Similarly Situated to Determine What Are the Reasonable Minimum Constitutional Standards Among The States As to Their Long Arm Statutes Regarding Service, Notice, and Methods of Proof of Service and Notice Upon Non-residents So Not to Be Repugnant to the United States Constitutions' Fourteenth Amendment Due Process and Equal Protection Clauses.**

In Mullane, Id., at 306, the Supreme Court wrote "when notice is a person's due, process which is mere gesture is not due process."

> "... we look to the realities of the case before us. In determining the constitutionality of a procedure established by the state provide notice in a particular class of cases, its effect must be judged in light of its practical application to the affairs of men [sic. and women] as they are ordinarily conducted." North Laramie Land Co. v. Hoffman 268 U.S. 276 at 283, 69 L.Ed. 953 (1925).

The Court cited North Laramie Land Co. in 1984 making a constitutional assessment of Kentucky's service of process statute

(posting service on the tenants' doors) as to the class of cases for in rem proceedings. Greene v. Lindsey 465 U.S. 444, 72 L.Ed. 249 at 256. Greene, Id. at 255 and 256, the Court stated in assessing in rem or in personam:

> "That is not say that the nature of the action has no bearing on a constitution assessment of the reasonableness of the procedures employed...But, 'all proceedings, like all rights are really against persons.'" Shaffer v. Heitner 433 U.S. at 207, 53 L.Ed. 2d 683 quoting Chief Justice Holmes of the Massachusetts Supreme Court.

Table One is a search of 25 states which have long arm statutes as to the states' requirements of service, notice of proceedings and proof of the same. "The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests." Greene, Id., 72 L.Ed 2d at 256. The Court noted

McDonald v. Mabee (Id.), the holding being

> "Personal service guarantees actual notice of the pendency of legal action; it thus presents the ideal circumstances under which to commence legal proceedings against a person, and has traditionally been deemed necessary in actions styled in personam."

Assuming the requisite "minimum contacts" theory and test are met under the states' long arm statutes for in rem or in personam jurisdictions, and while under the cases of Mullane and Greene a method of service must be employed which is "reasonably calculated" and designed to give the defendant actual notice per Milliken v. Meyer 311 U.S. 457, 61 S.Ct. 339 (1940), considering Mullane and Greene, they held mail, certified or otherwise, met that test. From state to state of the ones searched, the requirements in the use of mail

and certified mail vary widely. Unlike Virginia, most states searched require a return receipt signed. Dr. O'Brien if he lived in Virginia and had been sued out of Mississippi would have not had a judgment entered against him (as he did in Virginia) under Miss. Code 1972 (Ann.) §13-3-63 even when certified or regular mail was used. A return receipt would have been required and if personal service had been actually delivered, the same "shall be filed in the Court wherein such action is pending before judgment can be entered against such non-resident."

In Indiana, if Dr. O'Brien had lived in Virginia and was sued in Indiana and he did not receive his mail, under Indiana Rules of Civil Procedures, Rule 4.06 and Rule 4.07, the Plaintiff may

apply for an order stating his last known address and the Clerk of the court (Rule 4.07) "shall appoint 'as attorney' a practicing attorney of the Court." Thereupon, diligent efforts must be made to inform the defendant, by mail, concerning the pendency and nature of the action against him. He must report the results within 50 days and if he can not inform the defendant concerning the action, he shall so report and 'shall then make a defense by answer if he can.'" (Indiana Civil Procedure Rule 4.07).

A considerable number of the states surveyed allow service and proof of service outside of the state where the defendant can be found having the same effect as if served within the state. This procedure guarantees actual service

for in personam jurisdiction. (T
Respondents SHC Corporation and the
counsel knew where Dr. O'Brien worke
See, App. B-5 through B-10, paragra
#4 thereof, and App. D-2 ). Under Vi
ginia's §8.01-329, it doesn't all
for that personal service muchless requi
it. The certified mail of Virgin
in O'Brien's case needed only be p
into the mail system and service w
deemed 'sufficient.'"

As can be seen from Table On
in many states where certified or regi
tered mail is used under the long a
statute, a return receipt is requir
and in a number of states, it must
shown to the Court to prove actual servi
was made on the non-resident defendan
U.S. Postal Regulations govern the u
of certified and registered mail. (S

Table 2 as to U.S. Postal Regulations). While the regulations on their face take all such mail seriously and have specific provisions to get the mail to the addressee, unless the addressee picks up that mail, the regulations provide the mail be sent back to sender which prevents service. Forwarding addresses can assist the post office carrier to bring such mail to the addressee, however, particularly in college and university towns this task according to the local post office presents an incredibly difficult task due to the constant coming and going of students.

The states vary widely on the procedures which they enact not to mention the disposition of the use of certified and registered mail and have little

uniformity. Suffice it to say that in a mobile and transient society, actual service, as this court noted in Greene, guarantees due process and equal protection of the law and many states apparently require actual service, Virginia being one that does not under its long arm statute service and notice provisions. To be insulated from Virginia's arbitrariness of Va. Code §8.01-329, one could by only living in Virginia. However, being a resident in Virginia with minimum contacts in Delaware or Michigan, the same result could happen to a Virginian under those two states' long arm statute's service and notice provisions.

To protect those inherent rights under the U.S. Constitution in order that a great disparity does not exist between the states and its citizens, the American citizen, wherever he lives

in the United States, should be afforded under the states' long arm statutes uniform minimum constitutional standards of procedures to guarantee they receive service, notice, and proof of service in order that one citizen of one state does not fail to have his due process and equal protection rights under-protected because of the laws in that regard of another state.

Of the states searched, many rise in that regard far about the Virginia Code §8.01-329 in protecting the rights of the American citizen to be advised of a pending action against them in another state so to be able to defend their rights and property from adverse state judgments which Dr. O'Brien faced being hamstrung first with default judgments that ultimately gained a civil judgment that grows at 12% per annum.

Those states certainly serve as models to assure citizens of the different states that they can obtain actual service.

A Writ should be granted to set forth constitutional standards, requirements, and guidelines for the states' long arm statutes as to services, notice, and proof of service.

**A Writ Should be Granted to Dr. O'Brien To Review The Decision of the Court Below to Grant the Respondents' Motion to Dismiss or In the Alternative, Summary Judgment Ruling That His Action was Inappropriate Under 42 U.S.C. §1983 As to the Respondent SHC Corporation And the Secretary of the Commonwealth Ruling No State Action Was Present.**

Lugar v. Edmondson Oil Co. 457 U.S. 992 (from 639 F.2d 1050 (4th Circ. 1981)), reversed in part, at 934-935, stated.

> "Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal

> right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.' **First, the deprivation must be caused by the exercise of some right on privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.** In Sniadach, Fuentes, W.T. Grant, North Georgia, for example, a state statute provided the right to garnish or to obtain prejudgment attachment, as well as the procedure by which the rights would be exercised. **Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.** This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." (457 U.S. at 934-935. Emphasis added.)

The respondent SHC Corporation knew Dr. O'Brien's work address, yet sought "significant aid" from the Secretary of the Commonwealth to gain a notice that was mere gesture. (Even the Secretary of the Commonwealth by the evidence adduced failed to mail certified mail

on the date stated in affidavit of compliance taking from Dr. O'Brien seven critical days that had the mail been sent as certified, Dr. O'Brien would likely have received before he moved.) Now, due to the same, a sizable collectible civil judgment exists against Dr. O'Brien that the SHC Corporation has attempted to enforce on at least one occasion in Massachusetts.

Moreover, SHC Corporation with that aid learned from the Secretary of the Commonwealth the mail had gone "unclaimed". Yet it ignored that information. Under the statutes governing the state courts (which would be immune from liability if Dr. O'Brien's constitutional rights were inadvertently violated), after the said respondents learned the mail went unclaimed, the respondent sought default judgments

from the state court to foreclose many of the 'defendants' rights and the state court agreed to do so knowing the defendants' mail went unclaimed. (See App. B-5 through B-10).

The state court under its state power appointed the respondents' counsel to deliver notice of its entered default judgments and a set trial date all of which the respondent, knowing the mail to Dr. O'Brien had gone previously unclaimed at the 184 Farrington address, nonetheless elected to use it again disregarding their knowledge of Dr. O'Brien's work address so known to the Respondent and its counsel. (App. E and App. B-5 paragraph #4 thereof).

Using the state default judgment entered in the manner it was and the final judgment secured from it, the

respondent SHC Corporation has attempted to collect on the Virginia judgment in Massachusetts where Dr. O'Brien worked as a student fellow in the Harvard Biological Laboratory. Certainly state action attached at that stage. See Henry v. First National Bank of Clarksdale (Henry II) 595 F.2d 291, at 229, cert. denied 444 U.S. 1074 (1980) citing Lugar.

Acts of private persons will be deemed to have been under "colour of state law" when the individuals are significantly interwoven with state and local governments and their agencies so that a "symbolic" relationship existed between the two and the acts of the individuals can easily be said to be acts of the political state. Burton v. Wilmington Parking Authority 365

U.S. 715, 6 L.Ed. 2d 45 (1961). This combined with the tests of Lugar clearly holds Dr. O'Brien should not have had his cause dismissed by motion to dismiss or by summary judgment.

A Writ should be granted to review the decision of the Courts' below barring Dr. O'Brien from proceeding under 42 U.S.C. §1983 under these particular facts and circumstances.

## CONCLUSION

For the above reasons, a writ of certiorari should be issued to review of judgments and opinions of the U.S. Court of Appeals for the Fourth Circuit and the United States Federal District Court for the Western District of Virginia, at Charlottesville.

Respectfully Submitted,

J. Benjamin Dick

J. BENJAMIN DICK
Counsel for
Denis R. O'Brien
421 Park Street
Suite 2
Charlottesville, VA 22901
(804) 977-6607
Attorney for Petitioner

## CERTIFICATE

I hereby certify that three true copies of the Petition were mailed this 21st day of July , 1986, to counsel of record, Brian Donato,Esq., 500 Court Square, Charlottesville, Va. 22901, John C.Lowe,Esq., 100 Court Square, Charlottesville, Va. 22901, and Gregory E. Lucyk, Assistant Attorney General's Office of Virginia, Supreme Court Bldg., Richmond, Va. 23219.

J. Benjamin Dick

J. BENJAMIN DICK

No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

DENIS R. O'BRIEN

*Petitioner,*

v.

SHC CORPORATION, et al.

*Respondents*

## PETITION FOR A WRIT OF CERTIORARI

## TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

## TABLE AND APPENDICES

J. Benjamin Dick, Esquire*
Law Offices of J. Benjamin Dick
421 Park Street
Suite 2
Charlottesville, Virginia 22901

*Counsel of Record

*Attorney for Petitioner*

TABLE ONE

Search of Various States on
Long Arm Statutes' Provisions
for Service of Process, Notice and
Proof of Service

## TABLE ONE

(Service and Notice Searched As To

Out of State Persons, Not Corporations

Or Organizations)

(NOTE: Search involves 24 states under their respective long arm statutes regarding method of service and notice and proof of service and notice thereof.)

1) Code of Alabama - Rules of Civil Procedure, Rule 4.2, Service and Notice Rule 4.2(b)(1).

Service and Notice through the Clerk of the Court by certified mail to last known address with instructions to forward return receipt requested showing to whom delivered, date of delivery and address delivered. Clerk makes entry on docket sheet and makes a similar entry when the return receipt is received by him.

If receipts shows a failure of delivery, service completed when plaintiff's attorney gives affidavit of facts indicating reasonable diligence utilized to ascertain the whereabouts of the party to be served. Rule 4.2(A) and (B) allows personal service by order of court by any persons over 18.

2) Arkansas Statutes (Ann.) 27-339.1 et. seq. - Service and Notice (same) 27-339(1)(3).

Allows personal service outside of state or use of mail. Secretary of state may be used with registered mail to last known address and return receipt must be filed in the office of the clerk.

3) Ann. California Statutes §416.10 through §416.90 - Service and Notice, §415.40 Proof of Service, §417.10 et. seq.

Any form of Air Mail requiring a return receipt service deemed complete on 10th day after mailing. Responsive pleadings must be filed 40 days after mailing.

4) Conn. General Stat. (Ann.) - §52-596 Service and Notice §52-596(C)

Service through the Secretary of State. Sent to Defendant's last known address by registered or certified mail, postage pre-paid. Secretary of state shall keep a record of each process and the hour of service.

Personal or abode service also allowed outside of the state.

5) Colorado Revised Statutes §13-1-124 Rules of Civil Procedure Rule 4 et. seq. (Manner of Service) §13-1-125 Rule 4(i)(3).

Personal service on the defendant allowed outside of the state. Other service pursuant to Rules of Civil Procedure. Service by mail allowed by Order of the Court directing clerk to send a copy of process to out-of-state defendants.

If mail is used, plaintiff must file a certificate stating date of mailing and the date the return receipt was received.

6) Delaware Code Ann. Chap. 31, Title 10, 3104 Service and Notice, 3104(d)

Secretary of the state served to get personal jurisdiction provided not later than 7 days following the filing of the return of service on the secretary to the court, the plaintiff sends to the non-resident a copy of the process and complaint served on the secretary by registered mail. 3104(d) provides that service on the secretary is as "effectual" as if it had been mailed upon the non-resident personally within the state.

Delaware also allows for personal service outside the state.

7) Florida Statutes Ann. §48-193 et. seq. Service and Notice, §48-194, 195

Personal service outside of state allowed.

8) Illinois Annotated Statute §17(1)(a) and (b); also Civil Procedure Act Service and Notice, §17, Subsection (2) (Repealed, Effective July 1, 1982, replaced with revised section 2-209.)

Permits personal service outside the state. Subsection (4) preserves the right to use other methods of service such as service under the Non-resident Motorist Act (Ill. Rev. Stat. §1953).

9) Hawaii Rev. Statutes §634-23 Service and Notice §634-25

Personal service outside the state. Where certified mail used, receipt must be signed by the defendant.

10) Indiana Rules of Trial Procedure Trial Rule 4.4 et. seq. Service and Notice TR 4.4(B), As provided in TR. 4.1. As Provided in Civil Procedure Rule 4.05. Warning Order Allowed Under Rules of Civil Procedure, Rule 4.06, and Rule 4.07.

Pertinent is Civil Procedure Rule 4.05 which provides in Civil Procedure Rule 4.06 that plaintiff may apply for an order stating last known address of defendant.

On such application, the Clerk of the Court shall appoint an attorney for the defendant a practicing attorney of the court. Such attorney must make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action against him and must report the results of his efforts within 50 days after his appointment.

If the warning order attorney cannot inform the defendant concerning the action, he shall so report to the court and shall then make a defense by answer if he can.

11) Kansas Statutes Ann. §60-308(b) Service and Notice, §60-308 et. seq.

Service allowed personally on defendant out of state with the same effect of service within the state. No default until 30 days after service.

12) Maine Revised Statutes Title 14 §704-A Service and Notice §704-A(3).

Service of process upon any person may be made by personally serving the summons upon the defendant outside the state.

§704-A(5)

Section §704-A does not limit or affect the right to serve any process in any other manner now or hereafter provided by law.

13) Code of Maryland CJ §6-103 Notice and Service §6-304.

Allows service outside of state where the defendant is found.

14) Massachusetts General Law Ann. 223A §1 Notice and Service 223A §6.

Allows service by any means in defendant's state.

Any form of mail that requires return, return receipt signed required to be filed.

Proof of Service by affidavit shall include signed receipt.

15) Michigan Complied Laws (Ann.) §600.1913 Notice and Service (same).

Certified or registered mail to last known address return receipt requested. No disposition of receipt made. Fact defendant does not receive mail does not necessarily violate due process. Moyer v. Lott 272 N.W.2d 232. (Michigan 1978).

16) Minnesota Stat. Ann. §543.19 Subdivision I Notice and Service, Subdivision 2.

Subdivision 2 allows nonresident to be personally served outside of state.

Subdivision 4 allows any other service allowed by Rules of Civil Procedure.

Rules of Civil Procedure, Rule 4.05, allows service by mail (1st class mail, postage prepaid with notice) but requires acknowledgment per Form 22 which states if non-resident fails to acknowledge he may be liable for any expenses incurred in serving the summons and complaint by any other manner permitted by law.

17) Mississippi Code 1972 (Ann.) §13-3-57 Notice and Service §13-3-63.

Allows service of process on any county of the state where defendant can be found.

Allows certified or registered mail to last known address. On actual delivery, receipt of certified mail or where someone serves by actual delivery and affidavit verifies the same shall be filed in the court wherein such action is pending before judgment can be entered against non-resident.

When the secretary of state utilized with certified or registered mail, the return receipt or even refusal to accept delivery shall promptly be returned to the clerk of court.

18) Missouri Statutes Ann. §506.500 et. seq. Service and Notice, §506.510.

§506.510(1). Allows personal service out of state on non-resident §506.510(2) allows petition with process fees to be sent to a court or court office in which area out of state defendant may be for service. An affidavit of service is required and shall the time, manner, and place of service.

19) Montana Code Ann. Montana Rules of Civil Procedure Rule 4B Service and Notice, Rule 4D(1)(a), 4D(2), 4D(3) Rule 4D(6)(a).

Allows for mailing of acknowledgment. If not received, any alternate service may be used.

Allows for personal service outside of the state in the same manner if served within the state.

Allows service on Secretary of State which is deemed "sufficient" when so served, similar to Virginia, except "return receipt" shall be received. If refused, that is the date of service. Provides for Secretary of State to require service by any qualified law enforcement official.

When the Secretary of State utilized, she must file with the Court an affidavit reciting the

day and hour of service, the return receipt of certified mail showing the date, time and hour received.

20) Nevada Revised Stat. (Ann.) Vol. 14, §14-065 Service and Notice, §14-065(1) Nevada Rules of Civil Procedure.

Allows service in manner consistent laws of service of non-resident's state.

Rule 4(e)(2) allows court on affidavit to grant an order that is sent outside of state against the non-resident for service.

21) New Jersey Statutes (Ann.) §39:7-1 Service and Notice §39:7-3(b).

Certified or registered mail and requires return receipt be filed with the court.

Personal service allowed outside of the state.

22) New Mexico Stat. 1978 §38-1-16(b) Service and Notice (same)

Allows for personal service outside of the state effective as if served within the state.

23) McKinney's Consolidated Laws of New York (Ann.) §306 Service and Notice, Civil Practice Law and Rules §302, §306, §308(2).

Allows for personal service outside of the state effective as if served within the state.

24) Vermont Statutes (Ann.) T12-§851 et. seq. Service and Notice (same) §913.

Allows for personal service outside of the state effective as if served within the state.

25) West Virginia Code §56-3.33 Service and Notice (same).

Allows for personal service outside of the state effective as if served within the state.

SUMMARY OF STATES SEARCHED
REQUIRING RETURN RECEIPT, AFFIDAVIT
OF SERVICE, OR OTHER DISPOSITION
ACTION BE FILED WITH STATE
CLERK OR COURT OR OTHER PERSON

1) Alabama
2) Arkansas
3) Colorado
4) Connecticut
5) Hawaii
6) Indiana
7) Massachusetts
8) Minnesota
9) Mississippi
10) Missouri
11) Montana
12) New Jersey

SUMMARY OF STATES SEARCHED
ALLOWING CERTIFIED OR REGISTERED MAIL
TO BE "SUFFICIENT" OR "EFFECTIVE"
SERVICE WITH NO REQUIREMENT ON
DISPOSITION OF RETURN RECEIPT.

1) Connecticut
2) Delaware
3) Michigan
4) Virginia

SUMMARY OF STATES SEARCHED
ALLOWING ACTUAL SERVICE OUTSIDE
OF THE STATE ON NON-RESIDENT TO BE
EFFECTIVE AS IF SERVED WITHIN THE
STATE; OR SERVICED BY
ORDER OF A COURT.

1) Alabama
2) Connecticut
3) Colorado
4) Delaware
5) Florida
6) Illinois
7) Hawaii
8) Indiana
9) Kansas
10) Maine
11) Maryland
12) Massachusetts
13) Minnesota
14) Mississippi
15) Missouri
16) Montana
17) Nevada
18) New Jersey
19) New Mexico
20) New York
21) Vermont
22) West Virginia

TABLE TWO

(U.S. Postal Regulations from the Domestic Mail Manual a/k/a DMM)

DMM Regulations, Chapter 9, §910 Special Mail Services.

§911 Registered Mail

§911.152 Return Receipt

§912 Certified Mail

§912.44(b) Return Receipt

§912.55 Notice of Arrival

§912.62(f) Final Notice

§911.152 Registered Mail - (DMM) Return Receipts. The sender may obtain a return receipt, Form 3811. Return Receipt, Registered, Insured, and Certified, by paying fees, in addition to the registration fee and postage, as outlined in 932.2.

§912.44(b) Certified Mail - (DMM) If a return receipt is desired, check the block on the mailing receipt to show the fee and endorse and article on the address side near the certified mail endorsement Return Receipt Requested or Return Receipt Requested Showing Address Where Delivered.

§912.55 - Notice of Arrival - (DMM) The carrier will leave a notice of arrival on Form 3849-A, Delivery Notice or Receipt, if he cannot deliver the certified article for any reason. The article will be brought back to the post office

and held for the addressee. If the article is not called for within 5 days, a second notice on Form 3849-B, Delivery Reminder or Receipt, will be issued. If the article is not called for or its redelivery requested, it will be returned at the expiration of the period stated by the sender, or after 15 days if no period is stated.

§912.62(f) - Final Notice and Clearance

(DMM) If the mail is not delivered in 5 days, issue a second and final notice to the addressee on Form 3849-B marked FINAL NOTICE. Send it through regular channels with the addressee's ordinary mail.

TABLE THREE

VIRGINIA STATUTES INVOLVED

## VIRGINIA STATUTES INVOLVED

**8.01-329. Service of Process or Notice.** - A. When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made in the same manner as is provided for in chapter 8 (§8.01-285 et seq.) of this title in any other case in which personal jurisdiction is exercised over such a non-resident party, or process or notice may be served on any agent of such person in the county or city in this State in which he resides or on the Secretary of the Commonwealth of Virginia, hereinafter referred to in this section as the "Secretary", who, for this purpose, shall be deemed to be the statutory agent of such person.

A1. When service is to be made on the Secretary, the party seeking service shall file an affidavit with the court,

stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.

B. Service of such process or notice on the secretary shall be made by leaving a copy of the process or notice, together with a copy of the affidavit called for in paragraph A1 hereof and the fee prescribed in §14.1-103 in the office of the Secretary in the city of Richmond, Virginia. Such service shall be sufficient upon the person to be served, provided that notice of such service, a copy of the process or notice, and a copy of the affidavit are forthwith sent by registered or

certified mail, with delivery receipt requested, by the Secretary to the person or persons to be served at the last known post-office address of such person, and an affidavit of compliance herewith by the Secretary or someone designated by him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in the action.

C. The Secretary shall retain a copy of each notice of service which he has sent to a person sought to be served for a period of two years; provided, however, that the Secretary shall not be required to retain in his records copies of any process, notice or affidavit served upon him. (Code 1950, §8-813; 1977, c. 617; 1979, c.31.)

SUPREME COURT OF VIRGINIA

RULES OF COURT INVOLVED.

Rule 3:17. Judgment by Default.

A defendant who fails to plead to a notice of motion for judgment within the required time is in default. He waives trial by jury and all objections to the admissibility of evidence. He is not entitled to notice, including notice to take depositions, of any further proceedings in the case except that no judgment by default shall be entered, when service of process is effected by posting pursuant default shall be entered, when service of process is effected by posting pursuant to §8.01-296(2)(b), until ten days' notice shall have been given as required by that section. The court shall, on motion of the plaintiff, enter judgment for

the amount appearing to the court to be due. If the relief demanded is unliquidated damages, the court shall hear evidence and fix the amount thereof, unless the plaintiff demands trial by jury, in which event, a jury shall be impaneled to fix the amount of damages.

# APPENDIX A

## OPINIONS AND JUDGMENTS BELOW

U.S. Court of Appeals for
the Fourth Circuit

U.S. District Court for the
Western District of Virginia
(At Charlottesville)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-1529

Filed April 22, 1986

DENIS R. O'BRIEN, Appellant

v.

SHC CORPORATION, et al., Appellees

---

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr. District Judge

---

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Murnaghan and Judge Williams, United States District Judge, sitting by designation.

For the Court,
/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-1529

UNPUBLISHED

DENIS R. O'BRIEN, Appellant

v.

SHC CORPORATION; JOHN C. LOWE; LOWE, GORDON, JACOBS & SNOOK, LTD.; LAURIE NAISMITH; GERALD BALILES, Appellees

---

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., District Judge. (C/A 84-0024-C)

---

Argued January 6, 1986

Decided March 4, 1986

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Before PHILLIPS and MURNAGHAN, Circuit Judges, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

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J. Benjamin Dick for Appellant; Brian J. Donato (Michie, Hamlett, Donato & Lowry, John C. Lowe (Lowe & Jacobs, Ltd.) on brief), Gregory E. Lucyk (Assistant Attorney General) for Appellees.

PER CURIAM:

Denis R. O'Brien filed an action under 42 U.S.C. §1983 against SHC Corporation, John Lowe, the law firm of Lowe, Gordon, Jacobs and Snook, Ltd., Laurie Naismith (former Secretary of the Commonwealth of Virginia), and Gerald Baliles (former Attorney General of the Commonwealth). Defendant SHC Corporation had previously obtained a default judgment against O'Brien in state court. O'Brien asserted that Virginia's long-arm statute and Virginia Supreme Court Rule 3:17 are unconstitutional, facially and as applied. He argues that the defendants' utilization of these provisions deprived him of his Fourteenth Amendment due process and equal protection rights in that he did not receive notice reasonably calculated to advise him of the proceedings against him. The defendants moved for summary judgment, a motion

the district court granted.

While we do not necessarily agree with all that was said in the opinion of the district court, we think that the district court reached a correct, proper, and equitable result. We therefore affirm for reasons sufficiently stated by the district court. Denis R. O'Brien v. SHC Corporation, et al., No. 84-0024-C, W.D. Va. (April 15, 1985) (unpublished).

AFFIRMED.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

No. 84-0024-C

Filed April 15, 1985

DENIS R. O'BRIEN,
individually, and on behalf of
all others similarly situated,
Plaintiffs

v.

SHC CORPORATION, et al.,
Defendants

---

ORDER

Judge James H. Michael, Jr.

---

For the reasons stated in an accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

1. The motion of defendants John

Lowe, Esquire, and Lowe, Gordon, Jacobs & Snook, Ltd. to dismiss or, in the alterrative, for summary judgment shall be, and it hereby is, granted as to summary judgment.

2. The motion of defendant SHC Corporation to dismiss, or in the alternative, for summary judgment, shall be and it hereby is, granted as to summary judgment.

3. The motion of defendants Laurie Naismith and Gerald Baliles to dismiss, or in the alternative, for summary judgment, shall be and it hereby is, granted as to summary judgment.

4. The plaintiff's motion to strike defendants' pleadings shall be, and it hereby is, denied.

5. The defendants' motions to strike portions of plaintiff's complaint shall be, and they hereby are, denied.

6. The defendants' motions for costs and attorney's fees pursuant to 42 U.S.C. §1988 shall be, and they hereby are, denied.

7. The defendants' motions for sanctions under Fed. R. Civ. P. 11 shall be, and they hereby are, denied.

8. This actions shall be, and it hereby is, dismissed and striken from the docket of this court.

The clerk is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED:
/s/ J. Harry Michael, Jr.
Judge
April 15, 1985

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

No. 84-0024-C

Filed April 15, 1985

DENIS R. O'BRIEN,
individually, and on behalf of
all others similarly situated,
Plaintiffs

v.

SHC CORPORATION, et al.,
Defendants

---

MEMORANDUM OPINION

Judge James H. Michael, Jr.

---

In 1980, a restaurant customer refused to pay the five-dollar penalty for losing his bar-tab. From this humble seed of discontent have sprung civil actions, spanning both the state and

federal judicial systems in two states. The matter is now before this court on the defendants' motions to dismiss or, in the alternative, motions for summary judgment, and defendants' motions for sanctions in the latest of these actions. In order to resolve these motions, and to its dismay, the court must walk the tortuous path of litigation between these parties.

Plaintiff Denis O'Brien resided in Charlottesville, Virginia, while he attended school at the University of Virginia. In late February, 1980, O'Brien visited the Mousetrap Restaurant, an establishment owned by defendants SHC Corporation, d/b/a Mousetrap Vintage Cellars. O'Brien lost his bar-tab and, upon leaving the restaurant, he refused to pay the five dollar fee which the Mousetrap Restaurant customarily charged

patrons who failed to produce their bar-tabs. A confrontation followed, and the police were summoned. O'Brien was eventually taken before a local magistrate, but no warrant issued.

O'Brien then filed two separate actions in the Charlottesville Circuit Court (one against SHC Corporation and Dianne Brubaker and the other against Christopher Wren) based on the Mousetrap Restaurant incident. These actions were summarily dismissed by the state court judge.

On February 16, 1982, defendants SHC Corporation and Dianne Brubaker, owner of the Mousetrap Restaurant, filed an action against O'Brien in the Circuit Court for the City of Charlottesville alleging abuse of process, malicious prosecution, infliction of emotional distress, and trespassing. Christopher

Wren, an employee of the Mousetrap Restaurant, filed an identical action. These plaintiffs knew that O'Brien had moved to Massachusetts, and therefore utilized Virginia's long-arm statute, Va. Code §8.01-329, to serve O'Brien. John Lowe, counsel for SHC Corporation, Brubaker, and Wren, submitted an affidavit to Secretary Laurie Naismith, stating that O'Brien was no longer a resident of Virginia, and that "the address of the defendant is as follows: Denis P. O'Brien, 184 Farrington, Wollaston, MA 02170".

Pursuant to Va. Code §8.01-329[1],

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[1] §8.01-329(A)(1) of the Code of Virginia requires that:

> When service is to be made on the Secretary, the party seeking service shall file an affidavit with the Court, stating either (i) that the person to be served in a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.

Secretary Naismith filed an Affidavit of Compliance on February 17, 1982, and mailed, by certified mail, return receipt requested, copies of the Motions for Judgments, together with the required Notices of Motions. Her cover letter was dated February 17, 1982, but the envelope was post-marked February 23, 1982. The post office unsuccessfully attempted to deliver the first notice on February 25, 1982, and the second on February 26, 1982. The final futile attempt at delivery of both notices was made on March 13, 1982. The letters were then returned to Secretary Naismith, marked "unclaimed". O'Brien entered no appearance in either case.

SHC, Brubaker, and Wren filed motions for default judgment on April 2, 1982. On April 5, 1982, default judgments were entered against O'Brien, and a

trial date was set to determine damages. Even though Virginia Supreme Court Rule 3:17 states that a litigant in default is not entitled to notice of any further proceedings, the state court judge ordered that O'Brien receive notice of the trial date. Defendant Lowe mailed (by certified mail) notice of the June 15, 1982, trial date to O'Brien's Farrington Street address.

The trial, conducted in O'Brien's absence, resulted in verdicts against O'Brien in the amounts of $52,400.00 in compensatory damages and $7,600.00 in punitive damages for SHC[2] and $2,400.00

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[2] Diane Brubaker was voluntarily dismissed from the action at the time of trial.

in compensatory damages and $2,400.00 in punitive damages for Wren[3]. Defendant Lowe, through Massachusetts counsel, then initiated collection proceedings in a Massachusetts state court. O'Brien appeared in that action.

In January 1984, O'Brien filed, in the Circuit Court for the City of Charlottesville, a motion to set aside the default judgments obtained by SHC, Brubaker, and Wren, asserting the lack of actual notice and an alleged irregularity in the composition of the jury.

In addition, O'Brien filed this §1983 action against SHC Corporation, John Lowe, and the law firm of Lowe, Gordon, Jacobs, and Snook, Ltd., Laurie

---

[3] Plaintiff O'Brien has not named Wren as a defendant in the current action, and apparently does not challenge this judgment.

Naismith (Secretary of the Commonwealth), and Gerald Baliles (Attorney General of the Commonwealth). O'Brien asserts that Virginia's long-arm statute and Virginia Supreme Court Rule 3:17 are unconstitutional, facially and as applied. He claims that the utilization of these provisions deprived him of his Fourteenth Amendment due process and equal protection rights in that he did not receive notice "reasonably calculated" to advise him of the proceedings against him. The defendants have moved for dismissal or, in the alternative, summary judgment in this action. They also seek costs and attorney's fees pursuant to 42 U.S.C. §1988 and sanctions pursuant to Fed. R. Civ. P. 11. These motions have been briefed and argued fully and are now ripe for disposition by this court.

As noted, each of the defendants

has moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) -- failure to state a cause of action for which relief can be granted. However, the parties submitted affidavits and other exhibits outside the pleadings in this action, and the 12(b)(6) motions must, therefore, be treated as motions for summary judgment pursuant to Fed. R. Civ. P. 56.

To establish entitlement to summary judgment, the moving parties must show that there are no disputed issues of relevant fact and that they are entitled to judgment as a matter of law. Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Norfolk, Virginia, 69 F. Supp. 826 (E.D. Va. 1946), aff'd on other grounds, 163 F.2d 289, cert. denied, 332 U.S. 841 (1947). In the Fourth Circuit, the rule is that such

a motion "should be granted only where it is perfectly clear that no issue of fact" is controverted, West v. Costen, 558 F.Supp. 564, 574 (W.D. Va. 1983) (quoting Stevens v. Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950), so that any further inquiry into the facts is not desirable in order to permit the application of the pertinent law.

After reviewing the pleadings and the numerous memoranda and attachments in this action, this court is convinced that there are no relevant disputed issues of fact in this case. In addition to the uncontested facts set forth in the preceding paragraphs, plaintiff admits that he did in fact reside at 184 Farrington on February 12, 1982, when defendant Lowe filed the affidavit for long-arm service of process, and

on February 17 and February 23, when the Secretary wrote the cover letter and mailed the proper forms for service pursuant to Va. Code §8.01-329.[4] In his deposition, plaintiff stated that he moved from the Farrington address "approximately" February 22, 1984, while in his affidavit he says that he moved "approximately" February 25, 1982. In either event, plaintiff asserts that he filed the proper forwarding address forms with the post office in Massachu-

---

[4] In his most recent memorandum, plaintiff suggests that the Secretary may not have included all of the required documents in the envelope mailed to plaintiff. However, plaintiff did not so allege in his complaint, nor has he supplied any supporting facts. Accordingly, the court will not entertain this motion.

setts.

Furthermore, plaintiff acknowledges that he found out about the default judgments entered against him by a telephone conversation with a friend in Charlottesville. This conversation occurred "some time in late April or early May". Plaintiff sated in his deposition that "within the week" he returned to the Farrington address and received a stack of mail, including the delivery slips. He went to the Post Office to claim the letters, but they had already been returned. O'Brien then drove to Charlottesville to look at the records in the courthouse. He discovered that the "jury trial was to occur within just a number of days". Thus, plaintiff admits that he knew about the default judgments prior to

the actual trial to establish damages.

The facts which are disputed--whether or not defendant Lowe tried to call O'Brien at his place of employment; whether or not O'Brien left a proper forwarding address form with the post office; the reasons for the delay between the Secretary's signing the affidavit of compliance and the postmark on the envelope -- are simply irrelevant to the resolution of these motions. This court, therefore, turns to the questions of law involved.

In order to establish a cause of action under 42 U.S.C. §1983, the plaintiff must prove two elements: first, that defendants deprived him of a right, privilege, or immunity protected by the Constitution or the laws of the United States, and second, that the defendants' acts were under color of

a state statute, ordinance, regulation, custom, or usage. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970); Flagg Bros, Inc. v. Brooks, 436 U.S. 149, 155 (1978). Some of the several defendants are in dissimilar positions and the court will address the validity of a §1983 claim against each defendant, seriatim.

The allegations against defendants Naismith and Baliles are, essentially, that Naismith served plaintiff with process pursuant to Virginia's long-arm statute and that Baliles failed to inform the Secretary of the Commonwealth of the asserted unconstitutionality of that statute. While these two defendants are certainly "state actors", they could be found to have deprived plaintiff of a right, privilege, or immunity only if the long-arm statute is in fact uncon-

stitutional.

The plaintiff contends that service upon a non-resident by means of certified mail, return receipt requested, fails to fulfill due process standards. In effect, plaintiff argues that due process requires actual notice. However, notice need only be "reasonably calculated to reach interested parties" to be constitutionally adequate. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950). Certainly, sending the certified letter to the address at which plaintiff admittedly resided on the date of the affidavit of compliance was notice "reasonably calculated to reach" the plaintiff. Neither actual notice, nor attempts at alternate means of service are required. As the Supreme Court stated in the Mullane case:

> [R]easonable risks that notice might not actually reach every [party] are justifiable. 'Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances, has to take some chances, and in the great majority of instances no doubt justice will be done.'

339 U.S. at 319, quoting Blinn v. Nelson, 222 U.S. 1, 7 (1911). The constitutionality of Virginia's long-arm statute has been recently upheld by the Fourth Circuit in Virginia Lime Co. v. Craigsville Distributing Co., Inc., 670 F.2d 1366 (4th Cir. 1982). Clearly, compliance with this statute cannot be deemed a deprivation of plaintiff's due process rights, and plaintiff cannot recover against defendants Naismith and Baliles.

The allegations against defendant John Lowe are that he (1) utilized the long-arm statute to obtain jurisdiction over plaintiff, and (2) that there was

some technical irregularity in his affidavit to the Secretary, in that he did not use the words "last known address".

Once again, plaintiff has failed to establish that this defendant deprived plaintiff of any right, privilege, or immunity. The constitutionality of the long-arm provision has been resolved, above. There is nothing sacred about the words "last known address" which would render the omission of these words non-compliance with the statute so long as the last known or, as in this case, actual address of the party to be served was provided by affidavit.

Furthermore, plaintiff has not proved the second element of a §1983 claim -- that defendant Lowe was acting under color of state law. The actions of a private attorney representing a private client are not acts under color

of state law. Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980), cert. denied, 454 U.S. 1141 (1982); Deas v. Potts, 547 F.2d 800 (4th Cir. 1976). See also Henderson v. Fisher, 631 F.2d 1115 (3rd Cir. 1980)(The utilization of statutory process procedures by private attorneys does not constitute state action.)

Plaintiff infers in his memoranda that there was some "collusion" between Secretary Naismith and defendant Lowe which resulted in the affidavit of compliance being dated February 17, 1982, but not postmarked until February 23, 1982. This is, apparently, an attempt to bring defendant Lowe within the "under color of state law" umbrella. Plaintiff concedes, however, that he has no facts supporting this theory, and merely interposes it as a possibility which should be explored in discovery. The realm

of "possibility" looms eternal, but this court must resolve these motions on the uncontested facts now before it.

There are no specific allegations against defendant Lowe, Gordon, Jacobs & Snook, Ltd. Plaintiff apparently included this law firm as a defendant on an agencyship theory. For the reasons stated with regard to defendant John Lowe, the plaintiff cannot establish a §1983 cause of action against this defendant.

Likewise, defendant SHC Corporation is a private company, acting through a private attorney. This defendant's actions cannot be considered under color of state law, and a §1983 claim against it must fail.

In conclusion, plaintiff has not established the requisite elements of

a §1983 action as against any of the named defendants and summary judgment is proper. Having determined that the federal causes of action will be dismissed, it would be improper for the court to assert pendent jurisdiction over the motion to set aside default judgment. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In light of these rulings, the court need not address the numerous other issues and defenses raised by the parties (statute of limitations, res judicata, immunity, assertion of class certification, etc.).

The defendants have moved for costs and attorney's fees pursuant to 42 U.S.C. §1988. Under this statute, a court may, in its discretion, award attorney's fees to a prevailing defendant if it finds that the plaintiff's action was

"frivolous, unreasonable, or without foundation". Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); Hughes v. Rowe, 449 U.S. 5, 14 (1980) (applying the Christiansburg standard to actions brought under 42 U.S.C. §1983). See also Bernstein v. Menard, 728 F.2d 252 (4th Cir. 1984). This court does not find that the plaintiff's pursuit of his claims against the defendants was "frivolous, unreasonable, or without foundation" within the meaning of Christiansburg.

The defendants also seek sanctions against plaintiff and his counsel pursuant to Fed. R. Civ. P. 11, alleging that this action was filed "merely to harass, create delay, and increase the costs of litigation". This court does not find the objective bad faith required

to impose Rule 11 sanctions. However, the court does note its strong disapproval of the unnecessary and unprofessional personal insults found within plaintiff's memoranda.

An appropriate Order shall this date issue.

ENTERED:
/s/ James H. Michael, Jr.
April 15, 1985

## APPENDIX B

VIRGINIA STATE AND COURT DOCUMENTS

Respondents' Counsel's Affidavit to the Secretary of the Commonwealth

Respondents' Motions for Default Judgments

State Default Judgment Orders

State Final Judgment Orders

COMMONWEALTH OF VIRGINIA
Secretary of the Commonwealth
Post Office Box 1-B
Richmond, Virginia 23201

February 17, 1982

AFFIDAVIT OF COMPLIANCE

Christopher Wren

vs.

Denis O'Brien

Virginia: In the Circuit Court for the City of Charlottesville, #2533

Notice of Motion for Judgment
and other papers filed therewith

I, the undersigned, Clerk in the office of the Secretary of the Commonwealth, hereby certify, on February 17, 1982, that legal service in the above styled case was made upon Laurie Naismith, Secretary of the Commonwealth, as statutory agent for nonresident persons to be served in accordance with Section 8.01-329 of the Code of Virginia, as amended, and that copy of the same was

forwarded by CERTIFIED MAIL, return receipt requested, to the person to be served as follows:

Denis O'Brien
184 Farrington
Wollaston, MA 02170

/s/ K. Page Lynch
Clerk,
Designated by the
Authority of
Laurie Naismith
Secretary of the
Commonwealth

City of Richmond
Commonwealth of Virginia
Acknowledged and sworn to before me this 17th day of February, 1982.
/s/ Karen C. Lynch
Notary Public
My Commission expires: 7/7/84

CIRCUIT COURT FOR THE CITY OF
CHARLOTTESVILLE, VIRGINIA

Case No. 2532

SHC CORPORATION, a Virginia
Corporation d/b/a MOUSETRAP
VINTAGE CELLARS, and
DIANNE B. BRUBAKER, Plaintiffs

v.

DENIS O'BRIEN, Defendant

---

AFFIDAVIT

---

I, John C. Lowe, counsel for the plaintiffs in the above-styled action, having been duly sworn, do depose and say that the defendant in this case is, upon information and belief, a non-resident of the State of Virginia. The address of the defendant is as follows:

Denis P. O'Brien
184 Farrington
Wollaston, Massachusetts 021170

I hereby request service on the

defendant pursuant to the appropriate statute.

/s/ John C. Lowe

STATE OF VIRGINIA, AT LARGE

Subscribed, sworn and acknowledged before me by John C. Lowe this 12th day of February, 1982.

/s/ Notary Public

CIRCUIT COURT FOR THE CITY OF
CHARLOTTESVILLE, VIRGINIA

Case No. 2532

Filed April 2, 1982

SHC CORPORATION, a Virginia
Corporation, d/b/a MOUSETRAP
VINTAGE CELLARS, and
DIANNE B. BRUBAKER, Plaintiffs

v.

DENIS O'BRIEN, Defendant

---

MOTION FOR JUDGMENT BY DEFAULT

---

Now come your plaintiffs, SHC Corporation, d/b/a Mousetrap Vintage Cellars, and Dianne B. Brubaker, by counsel, and represent unto the Court as follows:

1. On the 12th day of February, 1982, your plaintiffs filed suit against Defendant Denis O'Brien.

2. Plaintiffs' counsel learned from the office where O'Brien works in Cambridge, Massachusetts, where his

home address is.

3. Plaintiffs had the Secretary of the commonwealth served with a copy of the Motion for Judgment with instructions to send a copy of said Motion for Judgment by certified mail to the defendant at his given home address.

4. By Affidavit of record in the file of this Court, on February 17, 1982, the Secretary of the Commonwealth mailed by certified mail a copy of the Motion for Judgment in this case. To date, said certified mail letter has not been claimed.

5. Service having been filed, and more than twenty-one days having elapsed since service was effected upon the defendant, your plaintiffs are entitled to default judgment in this matter.

WHEREFORE, your plaintiffs pray for judgment by default against the

defendant, and pray, after the granting of said motion, that this matter be set for a trial by jury to determine the quantum of damages owning in the case.

SHC CORPORATION,
d/b/a Mousetrap
Vintage Cellars
and
Dianne B. Brubaker
By Counsel

/s/ John C. Lowe
Lowe, Gordon, Jacobs & Snook , Ltd.
409 Park Street
Charlottesville, Virginia 22901

CIRCUIT COURT FOR THE CITY OF
CHARLOTTESVILLE, VIRGINIA

Case No. 2533

Filed April 2, 1982

CHRISTOPHER WREN, Plaintiff

v.

DENIS O'BRIEN, Defendant

---

MOTION FOR JUDGMENT BY DEFAULT

---

Now come your plaintiffs, Christopher Wren, by counsel, and represent unto the Court as follows:

1. On the 12th day of February, 1982, your plaintiffs filed suit against Defendant Denis O'Brien.

2. Plaintiffs' counsel learned from the office where O'Brien works in Cambridge, Massachusetts, where his home address is.

3. Plaintiffs had the Secretary of the commonwealth served with a copy

of the Motion for Judgment with instructions to send a copy of said Motion for Judgment by certified mail to the defendant at his given home address.

4. By Affidavit of record in the file of this Court, on February 17, 1982, the Secretary of the Commonwealth mailed by certified mail a copy of the Motion for Judgment in this case. To date, said certified mail letter has not been claimed.

5. Service having been completed, and no answer having been filed, and more than twenty-one days having elapsed since service was effected upon the defendant, your plaintiffs are entitled to default judgment in this matter.

WHEREFORE, your plaintiffs pray for judgment by default against the defendant, and pray, after the granting

of said motion, that this matter be set for a trial by jury to determine the quantum of damages owning in the case.

CHRISTOPHER WREN
By Counsel

/s/ John C. Lowe
F. Guthrie Gordon, III
Lowe, Gordon, Jacobs & Snooks, Ltd.
409 Park Street
Charlottesville, Virginia 22901

CIRCUIT COURT FOR THE CITY OF
CHARLOTTESVILLE, VIRGINIA

Case No. 2533

CHRISTOPHER WREN, Plaintiff

v.

DENIS O'BRIEN, Defendant

---

JUDGMENT BY DEFAULT

---

This day came the plaintiff, by counsel, and moved the Court for judgment by default against the defendant. And it appearing that the defendant was served by the Secretary of the Commonwealth on February 17, 1982, and that no answer or responsive pleading of any kind has been filed by him or on his behalf, and more than twenty-one (21) days having elapsed since said service,

BE IT ORDERED that plaintiff be and he hereby is awarded judgment by

default against the defendant, and this matter set down for a trial by jury to determine the quantum of damages owing in the case. **Plaintiff is directed to mail a copy of this order to the defendant (judges handwriting).**

ENTER: /s/ Herbert A. Pickford
DATE: April 5, 1982

I ask for this:

/s/ F. Guthrie Gordon, III
Counsel for Plaintiff
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901

CIRCUIT COURT FOR THE CITY OF
CHARLOTTESVILLE, VIRGINIA

Case No. 2532

SHC CORPORATION, a Virginia
Corporation, d/b/a MOUSETRAP
VINTAGE CELLARS, and
DIANNE B. BRUBAKER, Plaintiffs

v.

DENIS O'BRIEN, Defendant

---

JUDGMENT BY DEFAULT

---

This day came the plaintiffs, by counsel, and moved the Court for judgment by default against the defendant. And it appearing that the defendant was served by the Secretary of the Commonwealth on February 17, 1982, and that no answer or responsive pleading of any kind has been filed by him or on his behalf, and more than twenty-one (21) days having elapsed since said service,

BE IT ORDERED that plaintiff be

and he hereby is awarded judgment by default against the defendant, and this matter set down for a trial by jury to determine the quantum of damages owing in the case. **Plaintiff is directed to mail a copy of this order to the defendant (judges handwriting).**

ENTER: /s/ Herbert A. Pickford
DATE: April 5, 1982

I ask for this:

/s/ F. Guthrie Gordon, III
Counsel for Plaintiff
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901

CIRCUIT COURT FOR THE CITY OF
CHARLOTTESVILLE, VIRGINIA

Case No. 2533

CHRISTOPHER WREN, Plaintiff

v.

DENIS R. O'BRIEN, Defendant

---

FINAL JUDGMENT ORDER

---

On the 15th day of June, 1982, came the plaintiff in person and by counsel, and, the Court having previously entered an order ruling that the defendant is in default after having been properly served under Virginia law at his place of residence in Massachusetts, and after having been given timely and proper notice of the trial dates of this cause, the Court undertook to select a jury of seven to hear evidence on the question of damages. The jury was selected and

the plaintiff put on his case.

The Court instructed the jury on the law of damages relative to cases of this kind, and counsel for the plaintiff argued the matter to the jury. The jury retired to consider its verdict and, after some time, returned with a verdict as follows:

> We the jury award the plaintiff, Christopher Wren, $2,400.00 in compensatory damages and $2,400.00 in punitive damages.
>
> /s/ Colin Rosse, Foreman

And the Court, finding the verdict to be proper, just and supported by the evidence,

It is ORDERED that Plaintiff Christopher Wren be, and he hereby is, awarded judgment against the defendant, Denis R. O'Brien, in the amount of $2,400.00 in compensatory damages and $2,400.00 in punitive damages in that

his deliberate, willful, wanton and malicious conduct caused injury to the plaintiff. And there being nothing further to determine, this case is ordered striken from the active docket to be placed among the ended files.

ENTER: /s/ Herbert A. Pickford
DATE: June 17, 1982

I ask for this:

/s/ John C. Lowe
Counsel for Plaintiff
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901
804-296-8188

CIRCUIT COURT FOR THE CITY OF
CHARLOTTESVILLE, VIRGINIA

Case No. 2532

SHC CORPORATION, a Virginia
Corporation, d/b/a MOUSETRAP
VINTAGE CELLARS, and
DIANNE B. BRUBAKER, Plaintiffs

v.

DENIS R. O'BRIEN, Defendant

---

FINAL JUDGMENT ORDER

---

On the 15th day of June, 1982, came the plaintiffs in person and by counsel, and, the Court having previously entered an order ruling that the defendant is in default after having been properly served under Virginia law at his place of residence in Massachusetts, and after having been given timely and proper notice of the trial dates of this cause, the Court undertook to select a jury of seven to hear evidence on the question

of damages. The jury was selected and the plaintiffs presented their case. By agreement of the plaintiffs' counsel, Plaintiff Dianne B. Brubaker was stricken as a party.

The Court instructed the jury on the law of damages relative to cases of this kind, and counsel for the plaintiffs argued the matter to the jury. The jury retired to consider its verdict and, after some time, returned with a verdict as follows:

We the jury award the plaintiff, SHC Corporation, $52,400 in compensatory damages and $7,600 in punitive damages.

/s/ Colin Rosse, Foreman

And the Court, finding the verdict to be proper, just and supported by the evidence,

It is ORDERED that Plaintiff SHC Corporation be, and he hereby is, awarded judgment against the defendant, Denis

R. O'Brien, in the amount of $52,400.00 in compensatory damages and $7,600.00 in punitive damages in that his deliberate, willful, wanton and malicious conduct caused injury to the plaintiff. And there being nothing further to determine, this case is ordered striken from the active docket to be placed among the ended files.

ENTER: /s/ Herbert A. Pickford
DATE: June 17, 1982

I ask for this:

/s/ John C. Lowe
Counsel for Plaintiff
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901
804-296-8188

RETARY OF THE COMMONWEALTH
POST OFFICE BOX 1-B
RICHMOND, VIRGINIA 23201

Denis O'Brien
184 Farrington
Wollaston, MA 02170

CLAIM CHECK NO.

☐HOLD

DATE
2.26.82
1ST NOTICE
3-7
2ND NOTICE
3-17
RETURN

Detached from PS Form 3849 Oct 1980

B-21

BEST AVAILABLE COPY

# COMMONWEALTH of VIRGINIA

*Secretary of the Commonwealth*

POST OFFICE BOX 1 B

RICHMOND, VIRGINIA 23201

B-22

February 17, 1982

AFFIDAVIT OF COMPLIANCE

Christopher Wren

vs.
Denis O'Brien

Virginia:
In the Circuit Court

for the City of Charlottesville

#2533

Rec'd
2/24/82

RULES OF THE VIRGINIA

SUPREME COURT

CODE OF VIRGINIA

1950

VOLUME 11 - 1986

RULE 3:5. DEFENDANT'S RESPONSE.

A defendant may within twenty-one days after service on him of the notice of motion for judgment file in the clerk's office his pleadings in response, and if he fails to file a pleading he is in default. A motion for a bill of particulars shall be deemed a pleading in response. Pleas of the general issue are abolished. If a defendant files no other pleading than grounds of defense, he shall file his grounds of defense within said time.

# APPENDIX C

## DEPOSITION OF DENIS R. O'BRIEN

## COMMONWEALTH OF MASSACHUSETTS

## SUPERIOR COURT

## No. 82-4860

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

MIDDLESEX, SS.

No. 82-4860

SHC CORPORATION d/b/a
MOUSETRAP VINTAGE CELLARS, Plaintiff

v.

DENIS R. O'BRIEN, Defendant

---

DEPOSITION OF DENIS R. O'BRIEN

---

DEPOSITION OF DENIS R. O'BRIEN, a witness called on behalf of the Plaintiff, taken pursuant to the applicable provisions of the Massachusetts Rules of Civil Procedure.

Q. Your name, please?

A. Denis O'Brien.

Q. Do you have a middle initial?

A. R. Richard.

(BREAK)

Q. And prior to your residing in Win-

chester you resided at 57 Webster Street in Arlington, Massachusetts?

A. Yes, sir.

Q. You resided there from the date of March 1, 1982 until August 31, 1982?

A. Those are approximate dates.

Q. And your previous address was 184 Farrington Street in Wollaston, is that right?

A. That's correct.

(BREAK)

Q. At the 184 Farrington Street address, is that a single family house?

A. Yes.

Q. It is located in Wollaston?

A. Yes.

Q. When you lived there you lived with a Mr. Gerard Raines?

A. That is what I testified.

Q. And Gerard is G-E-R-A-R-D?

A. You will have to check the record.

Q. And Raines is R-A-I-N-E-S. Did he own the building?

A. I don't know.

Q. You paid rent to him?

A. I paid my rent to him.

Q. When you moved in did you pay him a security deposit?

A. I don't know. I believe I did, even before I left from Virginia. I think I sent that ahead of me.

(BREAK)

Q. No, I think we are getting very close to critical issues here. Let me rephrase the question. Did you have a lease at that location or were you a tenant at will?

A. No lease.

Q. Were you evicted or did you leave voluntarily?

A. I left voluntarily.

Q. Was this a one-story house or two-story house or neither?

A. Mr. Newman, you are going to have to make clear to me know this connects to Virginia.

Q. I am not going to have to make it clear to you.

A. Then I am not going to answer any questions about the structure of the house.

Q. Did you have a separate entrance to your living quarters?

A. I would have to object to any further questions about --.

Q. Did you have a mailbox at this location?

A. Yes, sir.

Q. Was it a mailbox that was attached to the house or was it out by the street?

A. Attached to the house.

Q. Was this a mailbox that you and Mr. Raines shared?

A. That's correct.

Q. Did you have any post office box at any other location?

A. No, sir.

(BREAK)

Q. Prior to your moving to Wollaston you resided in Virginia, is that right?

A. That's correct.

Q. That was in Charlottesville?

A. That's correct.

Q. For what period of time were you living in Charlottesville?

A. From spring of 1975 until winter of 1981.

Q. During that time you were a student there?

A. That's correct.

(BREAK)

Q. Your work address is what?

A. It is in the records. Harvard Biological Laboratories.

Q. And that is located where?

A. 16 Divinity Avenue.

Q. In Cambridge?

A. In Cambridge.

(BREAK)

Q. Were you working there at the time that you moved to Massachusetts Mr. O'Brien?

A. Yes, sir.

Q. Would it be fair to say that you were working there for at least a year after you moved to Massachusetts?

A. Yes, sir.

Q. Did you move directly from Charlottesville to Massachusetts?

A. That's correct.

(BREAK)

Q. When you left Charlottesville for the Boston area, did you do anything to make sure that your mail got forwarded to you?

A. I don't recall. I don't recall.

Q. Do you recall whether you notified the post office of a forwarding address?

Q. To the best of my recollection, I did. I would have to go back and find letters with the yellow forwarding slips to verify that.

Q. When you gave them a forwarding address it was the Farrington Street address?

A. Either that or the Harvard address. I most likely gave the Harvard address. The Farrington address was tc be a temporary residence.

(BREAK)

Q. How was it that you found that particular place to live?

A. I answered an advertisement in the Boston Globe.

Q. Were you ordering the Boston Glode in Charlottesville for a while?

A. No, it was sent to me by a friend of a friend.

Q. So it is fair to say that you answered that ad while you were still in Charlottesville?

A. That's correct.

Q. And made your arrangements with Mr. Raines while you were still in Charlottesville?

A. That's correct.

(BREAK)

Q. How was it that you became aware of the pendency of that civil action?

A. I was notified. I had called Charlottesville, Virginia to discuss some data with people and a young woman who answered the telephone said she was sorry I lost my case. It was the first instance that I knew that I had lost, I had been sued in the Commonwealth of Virginia.

Q. And this you believe was in April, 1981?

A. Or May. It may have been later.

(BREAK)

Q. She was an acqutaintance of your while you were studying at Charlottesville?

A. That's correct.

Q. Could you tell me to the best of your recollection what she said to you about this civil case in Charlottesville?

A. Yes, she said that, "I am sorry you lost your case." I thought she was referring to my previous suits against the restaurant. I told her that it had been some months since I had lost those cases, and she retorted that it had only been in the last few weeks that I had been in the newspapers. That was the first indication I had that there was anything amiss in Virginia.

Q. After this telephone conversation did you do anything? Did you take any

action to check into the situation?

A. That is when I went to the Wollaston address to talk to Jerry Raines to see if any notices had been sent there.

Q. So this would have been again, having in mind the date of your conversation with the woman in Charlottesville, how soon after that would you say this conversation with Mr. Raines?

A. It must have been within the week.

Q. Okay. The conversation with Mr. Raines took place at the Wollaston address on Farrington Street?

A. Yes.

Q. When you went to see him was he living there by himself?

A. I believe so. I am not certain.

Q. You had a conversation with him when you went there?

A. That's right.

Q. Was anyone else present during this

conversation?

A. I don't think so.

Q. Could you tell me to the best of your recollection what you said an what he said in this conversation?

A. He said that he was not aware of any attempt to contact me other than a stack of letters which he handed to me. The stack of letters included one or two pink slips, delivery slips, which I immediately took to the post office and tried to collect and it was too late. The letters had been returned.

(BREAK)

Q. When you left the Farrington Street address did you leave any forwarding address?

A. I did.

Q. With whom did you leave it?

A. With the postal office at Quincy, Massachusetts.

Q. What address did you leave?

A. I left the Webster Street address.

(BREAK)

Q. Were you ever able to retrieve these letters which had been sent to you?

A. No, sir.

Q. After you were unable to retrieve this letter, did you do anything else with respect to this situation in Charlottesville that you had learned about from your friend who you spoke with over the telephone?

A. I don't understand the question.

Q. You spoke with the Asian on the telephone who informed you about a civil action, right?

A. Yes.

Q. It would be fair to say that you were somewhat concerned about it so that you went out to see Mr. Raines to see what the situation was?

A. Yes.

Q. After you went to the post office in Wollaston and found that there were no letters waiting for you there, did you take any further steps to investigate the situation with respect to the civil action in Virginia?

A. I subsequently drove to Virginia to Charlottesville and looked at the record in the courthouse.

Q. Having in mind the conversation with Mr. Raines, how soon after that did you drive to Charlottesville?

A. I can't tell you. I don't know.

Q. Do you remember what season it was when you got to Charlottesville?

A. It was middle to late spring.

Q. Where did you go? The Circuit Court of Charlottesville?

A. The Circuit Court for the City of Charlottesville.

Q. At that time, what did you find out, if anything?

A. I found out that there had been a default judgment entered against me and that there was to be a jury trial to assess the damages and that jury trial was to occur within just a number of days. That was the first official notice I had seen regarding any proceedings against me in Virginia, and I sought those out myself rather than having been sent them.

Q. And you go to the clerk's office at a stage in the proceedings when there had been a default entered against you?

A. That's correct.

Q. But there had not yet been a jury trial on the damages issue, is that correct?

A. That is the way I understood it.

Q. When you found this out what, if

anything, did you do?

A. I went back to Massachusetts.

Q. You didn't take any steps to attempt to vacate the judgment?

A. I didn't know what vacating a judgment meant.

(BREAK)

Q. What action did you take after you found out about the status of the pending court case in Charlottesville when you went down there for a day?

A. I returned to Massachusetts and I tried to find out what my legal responsibilities were by talking to a variety of people that I thought might listen to me.

Q. Who were those people?

A. Again, I can't tell you. The ACLU is one. I communicated with them. Most of these people wouldn't talk to me without putting up money, and I didn't

have any money to put up.

Q. So you were attempting to get local representation in the pending matter in Virginia?

A. I was trying to find out what I had to do within the law.

Q. Were you able to find out what you had to do within the law?

A. The best information I had was not to submit myself to the jurisdiction of a court that has improperly served you.

Q. Who told you that?

A. I believe I finally dug that out of the Harvard Law Library on my own.

Q. Was this before or after the scheduled jury trial date?

A. It must have been after because by the time I knew about the jury trial, it was only a day or two.

Q. Have you ever seen that before?

A. This document (Respondents' Virginia Motion for Judgment) or a copy of it was submitted with the pleadings in Massachusetts at one point.

Q. And that is the first time you ever saw it?

A. The first time I ever saw it.

Q. When you went through the papers in the clerk's office in the Circuit Court for the City of Charlottesville when you were there in early June of 1982, did you take any notes of what you saw in there?

A. No, sir.

Q. Did you make copies of any of the documents that you saw in there?

A. No, sir.

Q. You simply took a look through the file and left?

A. That's correct, sir.

# APPENDIX D

DENIS O'BRIEN AFFIDAVIT

FROM MOTION TO VACATE DEFAULT JUDGMENT

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

Civil Action No. 84-0024(C)

DENIS R. O'BRIEN et al., Plaintiffs

v.

SHC CORPORATION, et al., Defendants

---

AFFIDAVIT OF PLAINTIFF DENIS R. O'BRIEN

---

Comes now Plaintiff O'Brien and of his own personal knowledge deposes and states as follows:

1. Prior to September, 1982 I neither knew Mr. J. Benjamin Dick, Esq., nor had I ever heard of him. My first communication with Mr. Dick took place in November, 1982. Any allegation that I consulted with Mr. Dick prior to November, 1982 is totally fallacious.

2. On January 5, 1982 in the court-

room of the U.S. District Court for the City of Charlottesville, I told John C. Lowe and others present that I was employed at the Harvard Biological Laboratories, Cambridge, Massachusetts. Later that same day Lowe sent a messenger to see me and I gave said messenger the same information. Lowe has stated in interrogatories submitted to the Massachusetts Superior Court that he knew my work address and telephone number in early 1982. Neither Lowe nor anyone else ever contacted me at my place of work to advise me of legal actions that were brought against me in the Commonwealth of Virginia.

3. I have never, under any circumstances or for any reason, knowingly avoided any service of process of any kind. During the year of 1982 I was nearly constantly present at my laboratory

and place of work and I could have been found and served there at virtually any time. In August of 1982 I returned a telephone call of a Massachusetts Deputy Sheriff and made arrangements to be present at my place of work so that he could easily serve me with Massachusetts process. This process related to a Massachusetts action brought against me as a result of, and based solely upon, the Virginia default decision in question in the present action.

4. As I have previously testified in depositions in the Commonwealth of Massachusetts, I became aware of the Virginia default judgment against me after said judgment was entered and shortly before a jury was convened to assess damages against me. I did not attend said jury trial for the following reasons:

a. I was neither advised of said

jury trial nor invited to attend it. Neither the court, nor any officer of the Commonwealth, nor the plaintiffs, nor anyone else ever notified me of any trial, or hearings, or any proceedings, or any pleadings or motions with respect to the actions against me in Virginia. Thus, the Virginia court, in my opinion now and at the time, had no jurisdiction over me. Furthermore, it was my opinion at the time and at present that I was not obligated to participate at any stage in proceedings initiated and implemented in total disregard to my due process rights.

b. At the time the Virginia actions were brought against me, and at all times subsequent to that, I was a resident of Massachusetts and therefore protested by Massachusetts laws and

court decisions which sever the long-- arms of sister states that fail to obtain jurisdiction over Massachusetts residents. I was aware of the following cases: Parfitt v. Dean Junior College (1968) 39 Mass. App. Dec 137; Kesler v. Pritchard 284 NE2d 602; Quinn v. Quinn (1977) 360 NE2d 904. It was at the time and is still my understanding that if I had appeared at said Virginia jury trial, I would have acknowledged jurisdiction by the Virginia court that it did not rightly have. This would have compromised my defense in the Massachusetts courts.

c. Because of my financial situation it was impossible for me to obtain a lawyer to represent me at said jury trial. Therefore, when I learned of the impending trial, I began to

prepare myself with the intention of appearing pro se. After many hour of studying in the Harvard law library it became clear to me that there was not enough time to prepare for the trial. It also became clear to me that the Virginia default judgment against me was obtained by unconstitutional means and that I was, or by right should be, protected by the U.S. Constitution and relevant Massachusetts law as noted above.

The foregoing statements are hereby sworn to by me, under penalties of perjury, on this, the 19th day of July, 1984.

/s/ Denis R. O'Brien

STATE OF VIRGINIA
AT LARGE

The above affidavit was sworn to and executed by Dr. Denis R. O'Brien on July 19, 1984 as being true to the best of his knowledge.

My Commission expires: 2/21/87

/s/ JoAnn E. MacPherson
Notary Public

# APPENDIX E

## INTERROGATORIES BY DENIS R. O'BRIEN AND ANSWERS BY SHC CORPORATION FOR MASSACHUSETTS PROCEEDING TO ENFORCE VIRGINIA JUDGMENT

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

MIDDLESEX, SS.

No. 82-4860

SHC CORPORATION d/b/a
MOUSETRAP VINTAGE CELLARS, Plaintiff

v.

DENIS R. O'BRIEN, Defendant

---

INTERROGATORIES POSED BY
DENIS R. O'BRIEN, Pro Se

---

Questions By O'Brien

1. Did you ever receive information indicating that the Defendant resided on Farrington Street, in Wollaston, Massachusetts? If so, set forth on what date and from whom you received such information and identify which of your attorneys, agents, investigators, employees or other persons acting in your behalf received such information.

Answer

1. Yes, Information obtained by attorney John C. Lowe on a date after January 1, 1982 from a secretary in a biology laboratory at Harvard University, who stated that the Defendant was a Fellow working out of or in conjunction with the laboratory. The exact date and the identification of the secretary are not known.

2. Have you ever had any communication with any person(s) residing at or visiting 184 Farrington St., Wollaston, Massachusetts? If so, set forth the date(s) of such communication, describe the form and contents of such communication, identify all parties to and witnesses of such communication and specify and identify who initiated such communication.

Answer

2. No.

3. Have you ever received information that the Defendant was employed at the Harvard Biological Labs, Cambridge, Massachusetts? If so, set forth on what date and from whom you received such information and identify which of your attorneys, agents, investigators, employees or other persons acting in your behalf received such information.

Answer

3. Attorney John C. Lowe received information from somebody at the University of Virginia that the forwarding address for the defendant was Harvard University, and that he was serving as a Fellow in a laboratory of some sort there. The name of the informant, the exact department at the University of Virginia and the precise identification of the laboratory at which the Defendant was purported to be employed are no

longer recalled by attorney Lowe. The department at the University of Virginia may have been the Department of Pharmacology, and it is not inconsistent with the memory of attorney Lowe that the laboratory might have been identified as the Harvard Biological Laboratory.

(Note: SHC Corporation contended in another answer to these interrogatories that their counsel tried to call Dr. O'Brien at the Harvard Laboratories. Dr. O'Brien refuted the same noting no messages were ever left if this were the case. No mail ever came to his work address, all mail being by certified mail to his 184 Farrington address where he no longer lived.